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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY AND
KERR-McGEE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether a mineral reservation clause contained in deeds executed by Santa Fe Pacific Railroad Company ("Santa Fe"), a corporation chartered by an 1897 Act of Congress, conveying railroad lands granted under Section 3 of the Act of Congress of July 27, 1866 ("Section 3 grant lands"), is void and unenforceable because the Section 3 grants, and all related rights, were transferred by operation of law to the Atchison, Topeka and Santa Fe Railway Company ("ATSF") in 1903 as a result of: (1) the Act of Congress of June 27, 1902, authorizing a transfer of Santa Fe's railroad and other property, including all rights, grants and franchises, to ATSF; (2) the express intent of Congress that the Section 3 grant lands or proceeds from their sale were to remain with and in aid of the railroad transferred to ATSF; and (3) limits on corporate purpose and power in Santa Fe's charter.

2. Whether the court of appeals' holding, that the reservation of "minerals" in Santa Fe's deeds conveying Section 3 grant lands is unambiguous as determined solely by reference to the clause itself, must be overturned because it is in conflict with decisions of this Court that, as a matter of law, the word "minerals" when used in a reservation clause with respect to conveyance of lands is ambiguous *per se* and makes necessary resort to other evidence of intent.

3. Whether the presiding judge's failure to recuse himself resulted in denial of due process to the petitioners as guaranteed by the Constitution of the United States, where the presiding judge of the Court of Appeals of the State of Arizona had extensive personal knowledge of material disputed evidentiary facts concerning the proceedings from prior legal representation, and where upon receipt of a suggestion of recusal the judge undertook an out-of-court examination in his former law firm's offices (which firm represented respondent Kerr-McGee Corpora-

tion until shortly before trial) of files covering his prior involvement, which files had not been produced pursuant to petitioners' earlier subpoena *duces tecum* served on the law firm.*

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* The following were plaintiffs and counterdefendants in the Superior Court of Apache County, Arizona and appellees in the Court of Appeals of the State of Arizona: Ransom Theodore Spurlock, Vernie Maria Spurlock, Charles Patrick Spurlock, and Nancy Jeneen Spurlock. The following were defendants and counterclaimants in the Superior Court of Apache County and appellants in the Court of Appeals of the State of Arizona: Santa Fe Pacific Railroad Company, a corporation; and Kerr-McGee Corporation, a Delaware corporation.

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SANTA FE PACIFIC RAILROAD COMPANY AND KERR-McGEE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

Petitioners Ransom Theodore Spurlock, *et al.* (hereinafter "the Spurlocks"), petition for a writ of certiorari to review the decision of the Court of Appeals of the State of Arizona in this case.

OPINIONS BELOW

The opinion of the court of appeals, —— Ariz. App., ——, 694 P.2d 299 (1984), is set forth in Appendix A ("App. A") to this petition at 1a-31a. The Judgments of the Superior Court of Arizona, Apache County, are set forth in Appendix B ("App. B") to this petition at 32a-64a.

JURISDICTION

The decision of the Court of Appeals for the State of Arizona was entered on October 18, 1984. A timely petition for review was filed with the Supreme Court of the

State of Arizona. An order denying the petition for review (App. C at 65a) was entered on January 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States; the Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292 ("Atlantic & Pacific Act" or "1866 Act"); the Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19 ("1871 Act"); the Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622 ("Santa Fe Railroad Act" or "1897 Act"); the Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405 ("Atchison Topeka Act" or "1902 Act"); Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898, 954-55, *amended by* Act of December 12, 1945, Pub. L. No. 256, 59 Stat. 606 (codified as amended at 49 U.S.C. § 10721 (1982)). These Acts and provisions are set forth in App. F at 69a-92a.

STATEMENT OF THE CASE

The dispute between the Spurlocks and Santa Fe Pacific Railroad Company ("Santa Fe") and Kerr-McGee Corporation ("Kerr-McGee") involves a mineral reservation clause affecting over four million acres in Arizona and New Mexico granted by Congress in 1866 to the Atlantic & Pacific Railroad Company ("Atlantic & Pacific"), Santa Fe's predecessor in interest. As demonstrated below, the various congressional enactments treating Santa Fe's corporate purpose and powers render the reservation clause void and unenforceable. For proper context, a brief summary of relevant legislation is set forth below.

1. In the second half of the nineteenth century, to provide for development of the western part of the country, Congress created numerous railroad corporations and granted them tens of millions of acres of public lands.

"The primary purpose sought by Congress in making the land grants was accomplished by the construction and operation of the roads and the development of the territories they served." H.R. Rep. No. 1910, 77th Cong., 2d Sess. 4 (1942). By Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292, Congress chartered one such corporation, the Atlantic & Pacific, to construct, maintain and operate a railroad and telegraph line from Missouri to the Pacific Coast, generally along the thirty-fifth parallel. Section 3 of the Atlantic & Pacific Act provided for a large grant of lands in New Mexico and Arizona to aid in construction and operation of the railroad.[1]

By 1871, the Atlantic & Pacific was encountering difficulties in financing its venture,[2] and Congress granted to it the power to borrow funds and secure the loans with mortgages of its railroad and other property. Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19. By 1896, however, the Atlantic & Pacific was unable to service the debt it incurred under the authority of the 1871 Act. Its Western Division, completed in 1885, was under protection of a committee of trustees with foreclosure proceedings pending. *See* S. Rep. No. 737, 54th Cong., 1st Sess. 2 (1896).

In response to this situation, the Atchison, Topeka and Santa Fe Railway Company ("ATSF") requested Congress to create a new federal corporation, to be funded by ATSF and which in turn would purchase at foreclosure, for $10.6 million, all assets of the Western Division, free and clear of all Atlantic & Pacific debts. 29 Cong. Rec. 1315, 1320 (1897). By Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622, Congress created

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[1] The full text of Section 3 of the 1866 Act is set forth in App. F at 72a-74a.

[2] Congress "assumed that the road would be built by popular subscription, and the sole direct authority given to raise funds for that purpose was the authorized issuance of $100,000,000 of its capital stock." S. Rep. No. 737, 54th Cong., 1st Sess. 1 (1896).

and chartered Santa Fe, which acquired all assets of the Western Division of the Atlantic & Pacific. Section 1 of the 1897 Act granted to Santa Fe "the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation, granted by the Act of Congress approved [July 27, 1866], incorporating the Atlantic and Pacific Railroad Company." 29 Stat. 622. Section 1 of the 1897 Act also provided that Santa Fe would "be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject under its charter or Act of Incorporation," including those relating to its status as a post and military route and the hauling of government freight and personnel at reduced rates. *Id.*

For approximately six years beginning in 1897, Santa Fe maintained and operated the railroad in the Western Division. In 1903, however, Santa Fe terminated its business as a railroad company and ceased all activity operating the railroad. In particular, by Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405, Santa Fe was authorized to and did transfer its railroad and other property, together with all of its rights, powers, privileges, grants and franchises, to ATSF.[3] The 1902 Act, like the 1897 Act, continued the duties and obligations of the original 1866 Act creating the Atlantic & Pacific.[4]

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[3] In 1902, ATSF held all of the capital stock and bonds of Santa Fe, and the proposed transfer was seen as a means of minimizing office and accounting expenses. In addition, the public would be aided because, as a result of the transfer, it would have to deal only with a single company operating the entire length of the "transcontinental Atchison, Topeka and Santa Fe Railway System." H.R. Rep. No. 1518, 57th Cong., 1st Sess. 1 (1902).

[4] Section 1 of the 1902 Act provided that ATSF would take the railroad and other property of Santa Fe

> subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall

On September 10, 1902, the Santa Fe Board of Directors adopted resolutions accepting the 1902 Act [5] and approving an Agreement dated June 30, 1902, providing that Santa Fe "agrees to convey its property to The ATSF and Santa Fe Railway Company." App. G at 93a-94a. On May 6, 1903, the Board authorized the approval of a deed "conveying all the railroad and other property, including all rights, powers, privileges, grants and franchises of [Santa Fe] to The Atchison, Topeka and Santa Fe Railway Company." App. H at 96a. *See also*, App. I at 97a. On July 1, 1903, such a deed was executed and conveyed to ATSF. App. J at 109a. Concurrently, Santa Fe ceased operating as a railroad.

At the same time it implemented the 1902 Act, Santa Fe attempted to execute a scheme directed to the Section 3 land grants under the original 1866 Act. On May 6, 1903, while Santa Fe's Board was approving the deed to ATSF, it also authorized the approval of a second deed conveying to "the Santa Fe Pacific Development Company the rights of [Santa Fe] under Section 3 of the Act of Congress approved July 27, 1866." App. H at 95a. Santa Fe Pacific Development Company ("Santa Fe Development") was a newly formed subsidiary corporation owned and controlled by Santa Fe.

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be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made.

32 Stat. 405. Additionally, Section 1 of the 1902 Act perpetuated the public purposes and conditions of the 1866 Act by providing:

> That said railroad shall remain as heretofore a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation, and subject also to all other rights of the United States.

32 Stat. 405.

[5] The 1902 Act was elective — Santa Fe was compelled to make the transfer by January 1, 1904 or the authorization of the Act became inoperative. 32 Stat. 405.

The Board directed that the deed to ATSF was not to be executed until after the Section 3 land grants were deeded to Santa Fe Development. App. H at 96a. The Board intended that, when Santa Fe deeded "all the railroad and other property, including all . . . grants" to ATSF, it would not be holding, and thus would not pass, title to any Section 3 grants. On May 30, 1903, Santa Fe executed the deed to Santa Fe Development purporting to convey the entirety of its Section 3 rights. App. I at 109a. Subsequently, on March 11, 1904, Santa Fe caused Santa Fe Development to execute a deed reconveying the rights under Section 3 of the 1866 Act to Santa Fe. App. K at 118a. Since that time in 1903, Santa Fe's business has been, not that of operating a railroad, but rather of land development and real estate.

2. Between 1947 and 1951, over 4,000,000 acres of land in Arizona and New Mexico originally granted to the Atlantic & Pacific pursuant to Section 3 of the 1866 Act were sold. The deeds conveying the land to the purchasers were executed by Santa Fe. Each of the deeds was nearly identical and contained a clause purporting to reserve to Santa Fe "all oil, gas, coal and minerals whatsoever." [6] The Spurlocks' parents purchased 70,000 acres of this land subject to the reservation clause.

In 1973, a dispute arose between the Spurlocks and Santa Fe concerning the ownership of helium deposits located in the Navajo Springs geological formation partially underlying the 70,000 acres of land. Kerr-McGee, under agreements with Santa Fe's lessees, was removing the helium to which the Spurlocks claimed title. In 1973, the Spurlocks filed suit in the Superior Court of Apache County for conversion of the helium and seeking to quiet title to the helium. Santa Fe then filed five separate lawsuits against the Spurlocks claiming title under the min-

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[6] The full text of the mineral reservation clause is set forth in Exhibit B, ¶ 1, to the Judgment of the Superior Court of Arizona, Apache County, App. B at 44a.

eral reservation clause to the clay, petrified wood, helium, nitrogen, and potash. In response to a claim by Santa Fe, the Spurlocks also filed a separate quiet title action with respect to the sand and gravel on their ranch lands.[7] The various suits were consolidated for trial or other disposition.

The Spurlocks' claim to the various substances was based on the unenforceability of the mineral reservation clause. Specifically, the Spurlocks believed that Santa Fe's scheme to attempt to negate the intent of Congress in authorizing the transfer of the complete holdings of Santa Fe to ATSF in the 1902 Act was ineffective, the grant lands in fact passed to ATSF in 1903, and Santa Fe's attempt to reserve mineral rights in such lands to itself was void and unenforceable. The Spurlocks also maintained that, even if Santa Fe could reserve to itself an interest in the grant lands, the proper interpretation of the ambiguous language of the mineral reservation clause was that the disputed substances were not intended by the parties to be reserved. Rather, title passed to the Spurlocks.

Following jury trial, the trial court found as a matter of law that the mineral reservation clause was void and unenforceable. App. B at 36a. The trial court's judgment also reflected jury findings that the parties did not intend the reservation clause to include helium, nitrogen, clay, petrified wood, or potash.[8] App. B at 37a, 53a, 58a,

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[7] Santa Fe's claim to the sand and gravel was based on a separate clause of the deeds providing for the use of such materials for railroad purposes. *See* App. B at 44a, ¶ 2.

[8] The jury found that there was a custom and usage of which the parties were aware and which they intended to incorporate into the deeds. Consequently, the clause "all oil, gas, coal, and minerals whatsoever" was intended to include only hydrocarbons — substances organic in origin, with a chemical composition of hydrogen and carbon compounds, used for fuel — and minerals produced as a component or constituent thereof. App. B at 37a.

63a. Thus, the jury found that the helium had been unlawfully converted and awarded the Spurlocks compensatory damages of $914,807, and punitive damages of $20,487,732.[9] App. B at 34a, 38a.

The court of appeals reversed all except that portion of the judgment quieting title to the sand and gravel in the Spurlocks.[10] The appellate court found that judgment should have been entered as a matter of law in favor of Santa Fe and Kerr-McGee under the mineral reservation clause. App. A at 4a. The court determined "to treat the term minerals as unambiguous" as a matter of law thus requiring determination only of a general intent of the parties to the deeds, without the aid of extrinsic evidence. App. A at 14a. Relying on the recent decision of this Court in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), and a 1938 Kentucky case, *Maynard v. McHenry*, 271 Ky. 642, 113 S.W.2d 13 (1938), the court found the general intent of the parties to be that Santa Fe reserved "all commercially valuable substances separate from the soil" so that the Spurlocks held rights only to use and enjoy the surface estate. App. A at 14a.

The appellate court also overruled the trial court's judgment that the reservation clause was void and unenforceable as a matter of law. Finding "no federal au-

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[9] Also in accord with these findings, the jury advised that title should be quieted in favor of the Spurlocks with respect to helium, nitrogen, clay, petrified wood, and potash. In addition, the jury advised that title to the sand and gravel should be quieted in favor of the Spurlocks, Santa Fe having abandoned any right it had to use the substances for railroad purposes. The trial court, agreeing with the advisory opinions of the jury, quieted title in favor of the Spurlocks with respect to all the disputed substances. App. B at 37a-38a, 49a, 54a, 59a, 64a.

[10] The appellate court affirmed this portion of the decision because Santa Fe did not raise "any issue concerning error with regard to this finding." App. A at 20a.

thority granting to the states the power to dissolve Santa Fe Pacific" (App. A at 24a), the court held that the Spurlocks "may not challenge the legal existence of Santa Fe nor complain that the conveyances were *ultra vires*." App. A at 22a.[12]

The court of appeals recognized the Spurlocks' contentions that, pursuant to the 1902 Act, "Santa Fe was required to convey the lawsuit lands to [ATSF]" and therefore "could not have been the legal owner of these lands" entitled to reserve to itself any interest in the lands. App. A at 21a-22a. The court's decision upholding the enforceability of the reservation clause impliedly rejected these arguments as well.[13]

REASONS FOR GRANTING THE PETITION

Between 1866 and 1902, Congress carefully crafted a statutory framework for development of western lands, supported by construction and operation of the railroad. The opening of the West and railroad construction on the frontier are no longer central. But continued land development in the West remains immensely important. The statutory framework in the 1866, 1897, and 1902 Acts has a controlling effect on land use issues today and it remains essential that courts correctly interpret the statutes that Congress intended to govern disposition of these lands and their mineral rights.

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[12] Having found that the Spurlocks could not challenge the corporate existence of Santa Fe, the court went on to state that the 1902 Act did not effect a *de jure* dissolution of Santa Fe (App. A at 24a) and the evidence indicated that Santa Fe engaged in some form of business generally from 1897 to the present. App. A at 25a. The court made no finding as to whether Santa Fe was engaged throughout this time in the business of operating a railroad.

[13] Nowhere in its decision did the court of appeals expressly address these arguments. The appellate court's discussion of the 1902 Act was limited to a determination of whether the language of the Act effected a corporate dissolution of Santa Fe. *See* App. A at 23a-24a.

This case presents a state court's fundamental misinterpretation of the 1866-1902 congressional scheme. The error is compounded by the Arizona Court of Appeals' disregard of constitutionally based limitations on the powers of federal corporations, which are wholly creatures of Congress. This case is therefore significant to the preservation of a statutory scheme that continues to play a central role in development of western lands and exploitation of rich mineral resources. Only this Court is in a position to redirect the course of interpretation that is commanded by unambiguous congressional intent.

Ultimately at stake are mineral rights in over 4,000,000 acres in New Mexico and Arizona.[14] Under the decision below, these rights will vest in Santa Fe, a federal corporation no longer fulfilling its limited pur-

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[14] The 70,000 acres of land held by the Spurlocks are but a small portion of the over 4,000,000 acres of grant lands sold by Santa Fe in the late 1940s and early 1950s subject to the mineral reservation clause at issue here. The decision in this case has a potential adverse impact upon the use and enjoyment of the entire 4,000,000 acres. For example, the outcome of this case may have a serious detrimental impact on land titles and acquisitions in the Grand Canyon National Park and Lake Mead National Recreation Area. More than 70,000 acres of land in those areas are encumbered with the Santa Fe mineral reservation clause. The National Park Service (the "Service") has acquired some of this acreage subject to the reservation clause but is unable to obtain final title opinions until the matter of the reservation is resolved. There are ongoing negotiations with respect to the Service acquiring some or all of the remaining acreage. Although negotiations between the Service and Santa Fe have been ongoing since the late 1970s with regard to the mineral reservation in these lands, they have not been successful because Santa Fe has taken the position that its land rights in the Grand Canyon and Lake Mead properties have substantial value of up to $500 per acre as of 1978. This value of the mineral reservation is based on the position that the reservation clause is enforceable and that Santa Fe is entitled not only to currently known substances, but to valuable substances of any nature discovered any time in the future. This is also the position by the court of appeals.

pose of operating a railroad. This important decision of first impression will rend carefully structured interrelationships among the Acts of Congress governing Santa Fe's creation, purpose, and powers.

I. The Section 3 Grants Were Transferred to ATSF in 1903 by Operation of Law.

The principal question presented in this case is whether the Section 3 grant lands and all related rights were transferred to ATSF by operation of law as a result of the 1902 Act and Santa Fe's 1903 transfer to ATSF of all of its railroad and other property, including all rights, powers, privileges, grants and franchises. Contrary to the decision of the court of appeals, Santa Fe could not, by transferring the Section 3 grants to Santa Fe Development prior to the transfer to ATSF, and then transferring them back to itself, retain the grant lands. Such action violated: (1) the language and intent of the 1897 Act and the 1902 Act; (2) the intent of Congress that the Section 3 grant lands were to remain with and in aid of the railroad; and (3) the corporate purposes and powers of Santa Fe's incorporating charter as enacted by Congress.[15]

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[15] The court of appeals incorrectly determined that the Spurlocks could not challenge the acts of Santa Fe as being without its corporate powers as conferred by Congress. Initially, the court focused on the wrong inquiry. The question is not whether a state has the power to dissolve a federal corporation. Indeed, the court of appeals recognized as much by concluding that "[t]he state courts must, therefore, look to federal law to determine whether a national, congressionally incorporated corporation, has been dissolved *de jure*." App. A at 23a. The court of appeals then incorrectly applied federal law in deciding whether the reservation clause was void and unenforceable.

The appellate court's conclusion that the Spurlocks are not entitled to challenge the reservation clause is also based on an incorrect statement of the findings of the trial court, *i.e.*, Santa Fe was *de jure* and *de facto* dissolved, therefore its acts were *ultra vires*. *See* App. A at 26a. Such is not the case; they were alterna-

1. The 1897 Act and the 1902 Act demonstrate that the 1903 transfer of the grant lands by Santa Fe to Santa Fe Development was ineffective for any purpose because the grant land rights under Section 3 of the 1866 Act became vested in ATSF in 1903. In 1897, when Congress chartered Santa Fe to acquire all the assets of the Atlantic & Pacific, including the Section 3 land grant rights, Congress intended Santa Fe to be the successor corporation to the Atlantic & Pacific, assuming all of its rights and obligations and fulfilling all of the purposes of the original 1866 Act. Section 1 of the 1897 Act expressly set forth the rights and correlative duties of Santa Fe:

> [It] shall have and shall be entitled to hold and possess *the franchises and property so sold, and to exercise the same rights, powers, privileges, grants and franchises,* including the franchise to be a cor-

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tive findings. Spurlocks' position is that, regardless of the corporate existence of Santa Fe, it was outside its corporate powers to sever the Section 3 grant rights from the railroad and retain them for itself. Thus, the Spurlocks are not, as the court of appeals states (App. A at 27a), questioning any right Santa Fe had "to exercise the corporate franchise or powers" conferred on it by Congress, just its right to go beyond those powers. Therefore, the authority relied upon by the court is wholly inapplicable. To the contrary, parties in interest, such as the Spurlocks, are entitled to challenge the acts of corporations, such as Santa Fe, as being outside the powers of the corporation as granted by Congress in the chartering act. *See, e.g., Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 40-53 (1891) (collecting cases).

In addition, contrary to the appellate court, estoppel does not apply to prevent the Spurlocks from challenging the reservation clause as void and unenforceable. This Court has repeatedly announced the rule that a void act or deed cannot form the basis for an estoppel because the void act or deed is not merely voidable, it is absolutely void and cannot be made good by ratification. *See Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669 (1914); *Starr v. Long Jim*, 227 U.S. 613 (1913); *Louisville, N.A. & C. R. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899); *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24.

> poration, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company . . . such new *company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject* under its charter or Act of incorporation . . . .

14 Stat. 292 (emphasis supplied).[16] Thus, Santa Fe was created as a federal corporation and its charter powers and purposes were the same as those set forth in the original 1866 Act.[17]

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[16] The legislative history of the 1897 Act also demonstrates that Santa Fe was intended to be the successor corporation to the Atlantic & Pacific:

> [The 1897 Act] will accomplish all the purposes desired, primarily and fully protecting all interests of the United States and giving to the mortgagees and purchasers at foreclosure sale the right to become a Federal corporation, *taking all the existing rights and franchises of the original company, as well as all its obligations to the Government, as provided for in the original charter act.*

S. Rep. No. 737, 54th Cong., 1st Sess. 3-4 (1896) (emphasis supplied).

[17] ATSF had requested that the transfer of the Atlantic & Pacific assets be to a federal corporation, as opposed to itself, a state chartered corporation, in order to obtain the benefits at that time of the status as a federal corporation. The request evoked expressions of concern, especially in light of abuses by the land grant railroads, including the Atlantic & Pacific, which had impaired the public purposes of the railroads. *See, e.g.*, 29 Cong. Rec. 1315, 1320, 1325 (1897). The 1897 Act was passed in this setting of many years of unsatisfactory experience with the land grant railroads. Thus, in order to protect the public interest against further abuse, Congress carefully stated its intention that Santa Fe assume and carry out the original purpose of the 1866 Act:

> [T]he original purpose of Congress is continued unimpaired, and the corresponding benefits and the use of the road for national purposes and regulation of charges therefor are preserved both for the road as now constructed and that which may be hereafter built.

S. Rep. No. 737, 54th Cong., 1st Sess. 3 (1896).

Five years later, in the 1902 Act, Congress authorized a second succession, this time from Santa Fe to ATSF. As with the 1897 Act, Congress protected the public interest by expressly stating that the rights and obligations of the successor corporation in the transfer were to be the same as those of the predecessor. ATSF was to have the same rights and obligations as Santa Fe under its charter, which in turn were the same as those of the Atlantic & Pacific under the original 1866 charter. Indeed, the operative language of the 1902 Act is nearly identical to that of the 1897 Act:

> [Santa Fe is] authorized and empowered to sell or lease its *railroad and other property, including all rights, powers, privileges, grants, and franchises,* to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such *purchaser or lessee shall take, hold, and use* the railroad and property sold or leased *subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company* as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants, and franchises relating to said railroad and property, or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company . . . .

32 Stat. 405 (emphasis supplied).[18] In each instance the successor corporation was to assume all rights and obligations of the predecessor corporation. It necessarily follows that Congress contemplated that the transfer authorized by the 1902 Act was to be of the *entirety* of the railroad and other property of Santa Fe, including

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[18] By reason of Santa Fe's election to transfer outright its railroad and other property to ATSF, the authorization to lease was rendered inoperative.

the Section 3 grants.[19] Congress would not have granted to ATSF all of Santa Fe's rights, nor imposed upon it all of Santa Fe's obligations, absent the intent that ATSF receive the whole of Santa Fe's railroad and other property.[20]

Under the 1902 Act, the Section 3 grants could have been transferred only to ATSF, and not to Santa Fe Development. The purported deed from Santa Fe to Santa Fe Development conveyed nothing because such a transfer would have been directly contrary to the operation of the 1902 Act. In turn, the 1903 deed from Santa Fe to ATSF, reciting that Santa Fe "has . . . sold . . . to the Atchison Company . . . all and singular, the railroad and other property, including all rights, powers, privileges, *grants* and franchises of the Santa Fe Pacific Company," App. J at 111a, passed to and vested in ATSF all of the Section 3 rights and grants.

2. In addition to the clear intent of the 1902 Act that the grant lands pass to ATSF, Congress repeatedly recognized the multiple purposes and conditions attendant to these grants of public lands. Congress intended that the grant lands (or revenues or proceeds therefrom) would remain with the railroad in order that statutory conditions and congressional purposes might be fulfilled.

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[19] Santa Fe recognized this congressional intent. The deed from Santa Fe to ATSF was drafted to track the "whole of the property" language of the 1902 Act. *See* App. J at 111a. However, Santa Fe did not allow the transfer to ATSF to take place until the grant lands had been removed temporarily from the whole of Santa Fe's property. *See* App. H at 96a.

[20] *See Chambers v. Atchison, T. & S. F. R. Co.*, 32 Ariz. 102, 255 P. 1092, 1092-1093 (1927) ("[t]hrough various mesne conveyances, the complete holdings of the Atlantic & Pacific Railroad Company became the property of plaintiff herein, the Atchison, Topeka & Santa Fe Railway Company, on July 1, 1903, and . . . they have remained such since that time.").

A wholesale severance of the lands from the railroad was not permitted.

The grant of public land to a railroad by an act of Congress constitutes a law, as well as a contract between the government and the railroad. The intent of Congress in making the grant must be fulfilled. In addition, the conditions of the grant in the contract must be met. *See, e.g., Wisconsin C. R. Co. v. Forsythe*, 159 U.S. 46 (1895); *Winona & St. P. R. Co. v. Barney*, 113 U.S. 618 (1885). As stated in *Santa Fe P. R. Co. v. Ickes*, 153 F.2d 305 (D.C. Cir. 1946), *rev'd on other grounds sub nom. Krug v. Santa Fe P. R. Co.*, 329 U.S. 591 (1947):

> The rights accruing to the railroad under such a grant are contractual; the railroad receiving the land in return for building and operating a line. *Burke v. Southern Pac. R. Co.*, 234 U.S. 669, 680, 34 S.Ct. 907, 58 L.Ed. 1527.

153 F.2d at 308.

There is no question that the primary purpose of Congress in creating the land grant railroads was to further settlement and development of the West. It was intended that grants of public land would aid in construction and operation of these railroads. *See* H.R. Rep. No. 1910, 77th Cong., 2d Sess. 4 (1942).[21] This purpose could be achieved only if the railroads, once built, were maintained and operated so that there could be a constant, efficient flow of goods and people back and forth to the West. Thus, the grant lands were to remain with the railroad in order that the lands, and revenues and

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[21] The House Committee on Interstate and Foreign Commerce, discussing the history of the land grant acts, stated:

> The primary purpose sought by Congress in making the land grants was accomplished by the construction and operation of the roads *and* the development of the territories they served.

H.R. Rep. No. 1910, *supra*, at 4 (emphasis supplied).

proceeds therefrom, could be dedicated to both construction and continued operation of the road.[22]

Another major condition of the land grants was that requiring the land grant railroads to transport Government personnel and freight without charge or at reduced rates. *See Krug v. Santa Fe P. R. Co.*, 329 U.S. 591 (1947). By the Act of Congress of June 7, 1924, ch. 291, 43 Stat. 447, 486, Congress provided that rates, not to exceed 50 percent of the public rates, would be established for

> any railroad which was aided in its construction by a grant of land *on condition* that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation . . . . (emphasis supplied)

The 1866 Act creating the Atlantic & Pacific contained these "land-grant rate obligations." *Krug v. Santa Fe*, 329 U.S. at 594-95. *See also, Chapman v. Santa Fe P. R. Co.*, 198 F.2d 498, 503 (D.C. Cir. 1951) (dissent),

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[22] In 1977 the Interstate Commerce Commission reaffirmed that the grant lands were intended to stay with the railroads:

> We are particularly concerned that lands which were granted by the Federal Government to railroads to enable them to fund the construction and operation of their rail lines — or the proceeds from the transfer of those lands or of interests in those lands — have been and will be transferred from the railroads to their parent holding companies at less than fair value. Were the railroads receiving these properties, or their railroad successors in interest, to be deprived of the fruits of these land grants at a time, whether now or in the future, when they are needed to support rail services essential to the public interest, the intention of the Congress in making these grants would be subverted, and today's citizens would lose the benefit of the contract made by their forebears with the land-grant railroads.

INTERSTATE COMMERCE COMMISSION, RAILROAD CONGLOMERATES & OTHER CORPORATE STRUCTURES, A REPORT TO CONGRESS AS DIRECTED BY SECTION 903 OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976, 74 (1977).

cert. denied, 343 U.S. 964 (1952). These obligations were assumed by Santa Fe under the 1897 Act, and later by ATSF pursuant to the 1902 Act.[23]

In imposing this condition, Congress anticipated that the railroads would use the revenues and proceeds from grant lands to provide the rate reductions. Indeed, such use of revenues and proceeds was a primary factor causing Congress to enact Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898, 954-955. Section 321(a) of the 1940 Act eliminated the Government rate preferences for land grant railroads except for military and naval property and personnel moving for non-civil purposes.[24] The 1945 amendment to Section 321(a), Pub. L. No. 256, 59 Stat. 606, eliminated the rate preferences entirely.

Congress recognized that the grant lands had always been tied to the obligation to charge reduced rates:

> The purpose of this bill is to remove the *obligation* of certain railroads *to transport* certain classes of Government traffic *at reduced rates pursuant to the conditions of land grants* . . . .

S. Rep. No. 1208, 78th Cong., 1st Sess. 1 (1944) (emphasis supplied).[25] Thus, Congress anticipated that the

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[23] Section 1 of the 1902 Act, 32 Stat. 405, expressly stated that the status of the Santa Fe railroad as a post route and military road was to be maintained, subject to Government use and rate regulation.

[24] Section 321(b) of the 1940 Act provided that, in order for a land grant railroad carrier to receive the benefits of Section 321(a), it was required to file a release of any claims it may have against the Government with respect to land grants made either to itself or to its predecessor in interest. 59 Stat. 954-955. Since only the present carrier was to file the release, the Section presumed that any land grant interests of a predecessor carrier would have passed to the present carrier.

[25] Congress determined first to reduce, and then eliminate, the rate preferences because it believed that the value of and the pro-

grant lands, or revenues and proceeds therefrom, would stay with the railroads to "subsidize" the Government rate preferences.[26]

The original 1866 Act set forth these multiple purposes for land grants of construction, operation and governmental use and reduced rates. Section 1 directed the Atlantic & Pacific to construct, maintain, and operate a railroad. Section 11 provided that the railroad was to carry Government freight and personnel at reduced rates. Section 20 summarized the object of the Act:

> to promote the public interest and welfare by the construction of said railroad . . . and keeping the same in working order, and to secure to the government at all times . . . the use and benefits of the same for postal, military, and other purposes.

14 Stat. 292. And Section 3 made large grants of public lands to aid in fulfillment of these purposes.[27] Congress

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ceeds from the grant lands had been surpassed by the railroads' foregone revenues from Government rail traffic. *See* H.R. Rep. No. 1910, 77th Cong., 2d Sess. 3 (1942); H.R. Rep. No. 393, 79th Cong., 1st Sess. 4 (1945).

[26] All of Santa Fe's income from its exploitation of the grant lands and reserved mineral interests has been deposited to the bank accounts of affiliated, non-railroad corporations, thereby demonstrating that the objective of the scheme undertaken in 1903 was to separate the benefits of the grant lands from the statutory conditions and obligations.

[27] Congress reaffirmed the multiple purposes of the 1866 Act in connection with the passage of the 1897 Act creating Santa Fe:

> In addition to the plain purpose of thereby promoting settlement of the country through which the road would pass [by construction and operation of the railroad], the Government use and purpose [in the 1866 Act] was, as expressed by Section 11 of the Charter Act [to be a post route and military road, subject to government use and rate regulation].

S. Rep. No. 737, 54th Cong., 1st Sess. 1 (1896). The Senate Report also specifically noted that "the governmental uses and purposes originally reserved in the charter act should be continued in the hands of [the] new parties," *i.e.*, Santa Fe. S. Rep. No. 737, at 2.

intended the land grants to be used to fulfill these multiple purposes. Thus, when Santa Fe accepted the 1902 Act and made the transfer to ATSF, it could not sever the benefits of the Section 3 grants from the conditions and congressional purposes imposed on the railroad.

3. The very nature of Congress' power, and in turn the power conferred by it on Santa Fe, prevented the retention by Santa Fe of only the Section 3 rights for the purpose of engaging in the real estate business. Corporations obtain their existence and powers from the legislature — they are creatures of legislation. *Thomas v. West Jersey R. Co.*, 101 U.S. 71 (1880). As stated by this Court in *Perrine v. The Chesapeake and Delaware Canal Co.*, 50 U.S. 172 (9 How. 92) (1850):

> Now, it is the well-settled doctrine of this court, that a corporation created by statute is a mere feature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence.

50 U.S. at 184 (citations omitted). *See also, Bankers Trust Co. v. Texas & P. R. Co.*, 241 U.S. 295, 305-306 (1916). Railroad corporations are no exception. *See Union P. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U.S. 564 (1896). Because of this status, the general rule is that statutes granting corporate powers, rights, privileges, and immunities are strictly construed in favor of the public interest and against the corporation. *See, e.g., Louisville & N. R. Co. v. Kentucky*, 161 U.S. 677 (1896); *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24 (1891).

When a corporate charter is granted by special act of Congress, it is especially subject to strict construction in order not to offend the Constitution. Congress has no inherent power to create a corporation. Rather, its power flows only from the Constitution. Under article I, section 8 of the Constitution, Congress may create a corporation if its purpose is necessary and proper to effectuate

one of the specific powers conferred on Congress or the government by the Constitution. Congress cannot create a corporation for any other purpose. *See, e.g., Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894); *California v. Central P. R. Co.*, 127 U.S. 1 (1888); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). Thus, Congress may create a corporation whose purpose is the construction and operation of a railroad pursuant to its powers "to establish post offices and post roads" and "to regulate commerce . . . among the several states." *U.S. Const.* art. I, § 8. *See, e.g., California v. Central P. R. Co.*, 127 U.S. at 39; *Pacific Railroad Removal Cases*, 115 U.S. at 18. Such a corporation has, however, only those powers impliedly necessary to the purpose of its incorporation, *i.e.*, the building and operation of a railroad. *See Wisconsin, M. & P. Railroad v. Jacobson*, 179 U.S. 287 (1900); *Pittsburgh, C. & S. L. R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U.S. 371 (1889). The purpose and powers of a federal railroad corporation must be interpreted to comport with the limitations on Congress' constitutional power to create such corporations.

Moreover, with regard to a corporation's power to hold property, it has been stated:

> [T]he corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. *It holds the property only* for the purposes for which it was permitted to acquire it — that is, *to effectuate the objects for which the Legislature created it.*

Perrine v. The Chesapeake and Delaware Canal Co., 50 U.S. at 184 (emphasis supplied).[29]

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[29] In the context of railroad corporations holding property for other than railroad purposes, it was noted in *Williams v. Johnson*, 208 Mass. 544, 95 N.E. 90 (1911):

Under Section 1 of the 1866 Act, Santa Fe, a federal corporation, was incorporated for the sole purpose of constructing, maintaining, and operating a railroad and telegraph line between designated points. With the transfer of its railroad and other property to ATSF, it no longer was engaged in the construction and operation of a railroad, and no powers necessary or incidental to fulfilling that purpose could exist for Santa Fe. It could not hold the Section 3 rights for purposes other than those permitted. *Case v. Kelly*, 133 U.S. 21, 26 (1890). The retention of the Section 3 rights by Santa Fe for a non-railroad purpose was thus outside the express and implied powers Congress was permitted to, and did, confer on Santa Fe and, accordingly, was *ultra vires* and void.[30]

In addition, Santa Fe did not have any explicit or implied power to transfer the Section 3 grants and rights

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> *When a corporation, created for the purpose of building and operating a railroad, goes into the business* of banking, or manufacturing and selling goods, or *dealing and speculating in real estate* . . . or if a bank should go to building and operating a railroad for like reason, it is easy to see that, in each instance, *the corporation is attempting to transact business which, under its organic act, it has no right or power to do.* (quoting *Waldo v. Chicago, St. Louis & Fond du Lac Railroad*, 14 Wis. 575, 581 (1861)).

95 N.E. at 92 (emphasis supplied).

[30] Moreover, when Santa Fe elected in 1903 to cease being a railroad by transferring its property, rights, powers, privileges, franchises and grants, it no longer had the federal purpose conferred on it by Congress, it had no other recognized federal purpose, and thus ceased by operation of law to be a federal corporation. Congress did not, and indeed could not, confer on Santa Fe the express purpose and power to engage in the real estate business.

In support of its finding that Santa Fe has continued to exist and conduct business (of some nature) since 1903, the appellate court notes that Santa Fe's existence has not been questioned in those cases wherein it has been a party. *See* App. A at 25a. In none of those cases, however, was Santa Fe's existence placed in issue and, accordingly, the courts were not called upon to address the question.

to Santa Fe Development. This is apparent from the very fact that Congress undertook passage of the 1902 Act:

> The object of the [1902 Act] is to permit the Santa Fe Pacific Company to sell or lease its railroad and other property [31] to the Atchison, Topeka and Santa Fe Railway Company . . . .
>
> *The original Act of Congress creating the Santa Fe Pacific Company,* above cited, *does not authorize such sale or lease,* and hence this additional authority is desired.

H.R. Rep. No. 1518, 57th Cong., 1st Sess. 1 (1902) (emphasis supplied). If Santa Fe did not have express or implied power to transfer its property, including its grants, to ATSF, without statutory authorization, it also did not have the power to transfer all of its Section 3 rights to Santa Fe Development without an act of Congress. The only power conferred by Congress in this regard was to make a transfer to ATSF. The unauthorized transfer to Santa Fe Development was thus ineffective. Santa Fe's election to exercise the power conferred by the 1902 Act and transfer all its property, including all grants, to ATSF, transferred the Section 3 grants and rights to ATSF.[32]

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[31] "Other property" was defined in Section 1 of the 1902 Act as "including all rights, powers, privileges, *grants,* and franchises." 32 Stat. 405 (emphasis supplied).

[32] The 1871 Act also demonstrates the extremely limited corporate powers granted to the Atlantic & Pacific, and thus to Santa Fe, by the 1866 Act. The 1871 Act, granting the railroad the power to borrow funds and mortgage its property, was necessary because the power to borrow and mortgage could not be implied from the authorization under the 1866 Act to construct and operate a railroad. So too, the power to sell or lease the railroad and other property could not be implied. Congressional authorization was needed for each of these actions. Given such limited implied powers, the power either to transfer the Section 3 rights to Santa Fe Development or to retain the Section 3 grant lands for purposes of engaging in the real estate business cannot be implied.

As the foregoing demonstrates, the decision of the court of appeals, rejecting the position that Santa Fe could not have retained the Section 3 grants and rights, is incorrect. If not corrected, Santa Fe will have achieved the objectives of the scheme it undertook in 1903 to separate the Section 3 grants from the railroad. Santa Fe will have been able, by means of its scheme, to obtain clear title to all but the surface estate of the more than four million acres covered by its mineral reservation clause. Moreover, Santa Fe will continue to operate a real estate business which Congress never had the power to permit and never intended to occur.

II. The Court of Appeals' Interpretation of the Term "Minerals" Conflicts With Decisions of This Court.

Even if Santa Fe were authorized to sever the Section 3 rights from the railroad and retain benefits by means of the mineral reservation clause, the appellate court's interpretation of that clause directly conflicts with decisions of this Court on interpretation of mineral reservation clauses. The appellate court's mistake is fundamental and unambiguous.

A grant of land by Congress is both a law and a contract regarding conveyance of land. In several instances Congress made grants of land while reserving to the government certain "mineral" rights or "mineral lands." This Court has often finally interpreted reservations in statutory contracts. *See, e.g., Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983); *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526 (1903). *See also, Watt v. Alaska*, 451 U.S. 259 (1981); *United States v. Northern Pacific Railway Co.*, 311 U.S. 317 (1940). In these cases the term "minerals" was *per se* found to be susceptible of more than one interpretation, *i.e., per se* ambiguous. The Court looked beyond the statutory contract for proper interpretation of "minerals."

For example, in *Watt v. Western Nuclear, Inc.*, this Court interpreted the government's mineral reservation clause under the Stock-Raising Homestead Act of 1916 ("SRHA"). The disputed clause, very similar to the one at issue here, provided that "all the coal and other minerals" in lands granted under the Act were reserved to the United States. This Court found the term "minerals" ambiguous. 462 U.S. at 56 ("the ambiguity in the language of the SRHA"); 462 U.S. at 61 (dissent) ("the ambiguity inherent in the term 'minerals' "). As a result, this Court relied upon numerous items of extrinsic evidence. Consideration was given, for example, to "[t]he legal understanding of the term 'minerals' prevailing" at the time that the statutory contract was enacted. 462 U.S. at 44. Consideration was also given to the various expressions of intent and understanding set forth in congressional reports, 462 U.S. at 44, n.5, 45-50; various expressions by government officials relating to the purpose of the reservation of minerals in the context of government legislation other than the SRHA, 462 U.S. at 48-49; and treatment of the substance under "mineral" clauses in other statutes, 462 U.S. at 56-59.[33]

This Court has held as a matter of law that the word "minerals" in a reservation clause with respect to conveyance of lands is ambiguous *per se*, and resort to other evidence of intent must be had. Here, the court of appeals' finding that "minerals" is unambiguous and that the intent of the mineral reservation clause is to be deter-

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[33] Similarly, in *Northern Pacific R. Co. v. Soderberg*, in determining whether granite was included under the proper interpretation of "mineral" as used in the Act of Congress of July 2, 1864 granting to the Northern Pacific Railroad certain lands, but reserving mineral lands to the United States, this Court did not confine its inquiry to the document to determine intent. Rather, it considered extrinsic evidence of such things as the expressions of intent by Congress with regard to the Act, subsequent actions of Congress under other acts utilizing the same term, and acts of government officials in implementing the word in dealing with parties other than those to the suit. 188 U.S. at 531-534.

mined solely by reference to the clause itself, directly conflicts with the decisions of this Court.[34]

With respect to both a conveyance of land by Congress and a conveyance by a private party, information outside the document is necessary to resolve ambiguity and determine intent. In the statutory context, it is relevant to consider such things as any congressional understanding of the term at the time the legislation was enacted or how the term was applied by officers of government agencies and departments. In the private deed context, it is relevant to consider, as was done by the trial court and jury here, such things as any common understanding of the term at the time of execution of the deed, or expressions by the grantor as to the meaning of the term in connection with other land dealings. *See Mapco Inc. v. Pioneer Corp.*, 615 F.2d 297 (5th Cir. 1980).

Thus, the trial court's decision that the disputed substances were not intended to be reserved to Santa Fe is in accord with the decisions of this Court, properly based upon an examination of the relevant extrinsic evidence of the intent of the parties, and must be reinstated.

III. The Presiding Judge's Failure to Recuse Himself Resulted in a Violation of Petitioners' Due Process Rights.

The decision of the court of appeals was made in violation of Canon 3C of the Arizona Code of Judicial Conduct[35] and the Spurlocks' right to due process of law

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[34] In reaching its conclusion, without resort to extrinsic evidence, that the intent was to sever the surface estate, the appellate court relied on *Watt v. Western Nuclear, Inc.*, a case in which that conclusion was reached only after extensive review of extrinsic evidence as to the intent of the use of the term "minerals."

[35] The Code of Judicial Conduct adopted by the American Bar Association, as amended by the Supreme Court of Arizona, governs the courts of Arizona pursuant to Rule 45 of the Rules of the

under the Fourteenth Amendment to the Constitution of the United States because the presiding judge had personal knowledge of disputed evidentiary facts concerning the proceedings. The Code of Judicial Conduct is a mandatory set of rules having the force and effect of a statute creating rights in the litigants. *See Weil v. Neary*, 278 U.S. 160 (1929); *Woods Construction Company, Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888 (10th Cir. 1964).

Immediately after this case was briefed on appeal and assigned to a panel, Spurlocks' counsel became aware that the assigned presiding judge, Judge Haire, had during 1959 to 1963 been involved as a practicing lawyer in most of the critical facts of this case. During this period Judge Haire was attorney for the receiver of Apache Oil and Helium Corporation ("Apache"), the primary assets of which were profits from leases covering helium deposits in the Pinta Dome geological formation located partially on the Spurlock ranch and adjacent to the Navajo Springs geological formation at issue in this case. The leases owned by Apache included a lease with the Spurlocks, and in 1956 these leases were assigned to Kerr-McGee, with Apache retaining a profit interest.

The treatment of helium under the leases and mineral reservation clauses affecting the Pinta Dome formation was a major disputed evidentiary area. As counsel for the Apache receiver, Judge Haire was called upon to review a great number of documents which later became

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Supreme Court of Arizona. Canon 3C of the Code provides in relevant part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

exhibits in this case. He participated in conferences, correspondence, and contractual dealings with some of the parties and many of the key witnesses in this case regarding the helium deposits on the Spurlock ranch.

Spurlocks' counsel immediately corresponded with Judge Haire and suggested that he consider recusing himself. Judge Haire responded by letter to counsel stating that he had gone to his former law firm's office [36] and spent several hours reviewing the files relating to his prior involvement. Judge Haire further stated that, after reviewing those files, he concluded that since he had not expressed an opinion on the issues which subsequently arose in this lawsuit he would not recuse himself.

Having refused recusal, Judge Haire presided over the case and participated in the decision which reversed the trial court's judgment on critical issues. The Spurlocks' motions and petitions before the Supreme Court of Arizona seeking review of this issue were denied. *See* App. D at 66a; App. E at 68a.[37] The Spurlocks now seek a determination that Judge Haire's failure to recuse himself resulted in a violation of due process of law and, for this reason, the decision of the court of appeals cannot stand.

Canon 3C of the Arizona Code of Judicial Conduct is identical in all material respects to 28 U.S.C. § 455 (1982).[38] Section 455(a) establishes the all-inclusive ob-

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[36] Judge Haire's former law firm represented Kerr-McGee during the first seven years of this case.

[37] The Spurlocks filed a Motion for Reconsideration of Order Denying Petition for Review, a Petition to Recall Mandate, and a Motion for Reconsideration of Order Denying Petition to Recall Mandate.

[38] In 1972, the House of Delegates of the American Bar Association adopted a new Code of Judicial Conduct which advocated the "appearance of justice" standard for judicial disqualification. *See* Note, *Disqualification of Judges & Justices in the Federal Courts,*

jective standard that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." [39] Section 455(b) further provides that a judge "shall disqualify himself . . . where he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." Under section 455 the judge is required to recuse himself if a reasonable person knowing all the circumstances would harbor doubts about his impartiality. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

Provisions such as section 455 and Canon 3C flow from the requirements of due process of law. *See* Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 Cal. L. Rev. 1445, 1447 (1981). This Court has repeatedly held that if a judge's participation created the appearance of bias, prejudice, or partiality, the party was denied due process of law. *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *In re Murchison*, 349 U.S. 133, 136 (1955). The Supreme Court of Arizona has adopted an identical position. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). Failure to recuse under these circumstances presents a question "of so grave a character, and involving considerations of public importance," so that a writ of certiorari should issue "without at all considering, for the purpose of such allowance, the questions urged concerning the merits of the cause." *Wm. Cramp & Sons v.*

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86 Harv. L. Rev. 736 (1973). In 1974 Congress enacted section 455, which codified this standard. H.R. Rep. No. 1453, 93rd Cong. 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Ad. News 6351, 6352.

[39] Section 455 overrides the precept that close cases involving disqualification should be resolved on the ground that a judge has a "duty to sit." H.R. Rep. No. 1453, *supra*, at 5. The "duty to sit" is replaced by a duty of disqualification if there is any question about the propriety of the judge's sitting. *Hall v. Small Business Admin.*, 695 F.2d 175, 178-179 (5th Cir. 1983).

International Curtis Marine Turbine Co., 228 U.S. 645, 650 (1913).[40]

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the Court of Appeals of the State of Arizona.

Respectfully submitted,

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April 29, 1985

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[40] A denial of due process also occurred in the manner in which Judge Haire made his decision not to recuse himself. Judge Haire made an out-of-court examination of the files of his former law firm, which were never made available to the Spurlocks or their counsel. This in effect made Judge Haire "a judge in his own case." *See, e.g., SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116-117 (7th Cir. 1977).

(2)

84-1698

No. ———

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY AND
KERR-McGEE CORPORATION,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CIV 6938
DEPARTMENT C

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs-Appellees,

v.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation; and KERR-MCGEE CORPORATION, a Delaware corporation,

Defendants-Appellants.

Appeal from the Superior Court of Apache County
Cause Nos. C-4779, 4910, 4936, 4961, 4949, and 4998
(consolidated)

The Honorable Paul G. Rosenblatt, Judge

AFFIRMED IN PART; REVERSED IN PART

[Filed Oct. 18, 1984]

Jack E. Evans, Ltd., by Jack E. Evans, Attorneys for Plaintiffs-Appellees, Phoenix.

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OPINION

MEYERSON, Judge

I. NATURE OF THE ACTION

The issues involved in this appeal arise from an action filed by Ransom and Vernie Spurlock and Charles and Nancy Spurlock (hereinafter collectively referred to as Spurlock) charging the defendants-appellants with the conversion of helium extracted from deposits underlying lands owned by Spurlock.

The conversion charges against defendant Santa Fe Pacific Railroad Company (Santa Fe Pacific) were based on the extraction of helium from underneath Spurlock's lands by various third parties who had leased mineral rights from Santa Fe Pacific. Santa Fe Pacific previously owned all of the ranch lands involved and claimed ownership of the underlying helium and other substances by reason of a mineral reservation in its original conveyances to Spurlock's predecessors in title. In addition to requesting damages for the conversion of helium, Spurlock also sought to quiet title to the helium as against Santa Fe Pacific. The conversion charges against defendant Kerr-McGee Corporation (Kerr-McGee) were based on the purchase of the raw helium gas by Kerr-McGee from Santa Fe Pacific's mineral lessees for processing at a plant constructed by Kerr-McGee for that purpose.

After the filing of the Spurlock action for conversion of the helium, Santa Fe Pacific filed separate actions

against Spurlock seeking to quiet Santa Fe Pacific's title under the mineral reservation clause to nitrogen, potash, petrified wood and industrial clay. Subsequently, Spurlock also filed a quiet title action against Santa Fe Pacific relating to sand and gravel on the lands involved. As to the sand and gravel, Santa Fe Pacific did not claim ownership by reason of the mineral reservation clause, but rather claimed a nonexclusive right to take gravel and ballast for railroad purposes pursuant to a different provision contained in the deeds to Spurlock's predecessors in title. These actions were all consolidated in the trial court proceedings.

After the denial by the trial judge of various motions and cross-motions for summary judgment, the consolidated matters eventually proceeded to trial before a jury.[1] An extended trial lasting approximately eight months was held, and eventually judgments were entered in favor of Spurlock and against Santa Fe Pacific and Kerr-McGee on virtually all issues. These judgments quieted title in favor of Spurlock and against Santa Fe Pacific as to all of the substances in issue, with an award to Spurlock of attorney's fees on the quiet title issues.

On the conversion claim, judgment was entered against Santa Fe Pacific in the amount of $664,502 for compensatory damages and in the amount of $20,000,000 for punitive damages. The judgment against Kerr-McGee on the conversion claim was in the amount of $250,305 for compensatory damages and $487,732 for punitive damages. Spurlock was also awarded pre-judgment interest on the compensatory damages awards. Attorney's fees were awarded to Spurlock in the amount of $525,000 against Santa Fe Pacific and $325,000 against Kerr-McGee.

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[1] As to the quiet title claims, the jury's function was advisory only.

Many issues have been raised in this appeal by Santa Fe Pacific and Kerr-McGee, and we will not attempt in this preliminary overview to state these issues individually or to set forth in detail the complete factual background necessary for their resolution. However, a principal issue involves the trial judge's refusal to grant judgment as a matter of law in favor of Santa Fe Pacific and Kerr-McGee under the mineral reservation clause. Other issues concern alleged misconduct of counsel for Spurlock; the trial judge's legal conclusions regarding the corporate nonexistence of Santa Fe Pacific; the trial judge's conclusion that the mineral reservation clause was void in its entirety; the sufficiency of the evidence to support the amount of compensatory damages awarded; and the amount and propriety of an award for punitive damages in an action for conversion of minerals in place. In light of our holding that judgment as a matter of law should have been rendered in favor of Santa Fe Pacific and Kerr-McGee (on all claims except sand and gravel), we need not reach every issue raised by appellants.

II. THE MINERAL RESERVATION

A. *Factual Background*

Prior to 1946, Santa Fe Pacific was the owner in fee simple of virtually all of the lawsuit lands. Most of these lands were acquired by Santa Fe Pacific under patents issued by the United States. The remainder of these lands was acquired by warranty deed from the New Mexico and Arizona Land Company. Santa Fe Pacific leased almost all of this property for grazing purposes. During 1945 and 1946, Santa Fe Pacific decided to sell many of its land holdings and offered the lands for sale to its grazing lessees. Each of these offers was made by a letter from E. O. Hemenway, the land commissioner of Santa Fe Pacific, to the grazing lessee, and each letter

stated that Santa Fe Pacific intended to "retain all minerals."

Under this program, in three separate transactions, Santa Fe Pacific conveyed what became the lawsuit lands to others. In 1946, Santa Fe Pacific conveyed by warranty deed 864.35 acres to Grace Porter. In 1947, Santa Fe Pacific contracted to sell some 76,000 acres of its holdings to Cowden Livestock Company and approximately 37,000 acres to the partnership of Spurlock & Wetzler. In September of 1951, Santa Fe Pacific issued warranty deeds to Cowden Livestock Company and Spurlock & Wetzler. Each of the three warranty deeds contained an identical reservation. See Section II.B., *infra.*

In 1950, non-combustible helium-bearing gas was discovered in the "Pinta Dome," an area to the west of the lawsuit lands and the Spurlock ranch. Kerr-McGee and others began to explore for and develop this helium-bearing gas. By 1959-60, exploration efforts expanded to the east into an area on the Spurlock ranch known as Navajo Springs, which was largely land subject to the Santa Fe Pacific mineral reservation. Beginning in 1959, Santa Fe Pacific entered into mineral leases for portions of the lawsuit lands with persons interested in exploring for and producing helium gas. In 1960, helium-bearing gas deposits were discovered under the lawsuit lands.

B. *Law of Other Jurisdictions*

The primary issue in this case is whether a deed reservation of "all oil, gas, coal and minerals whatsover, already found or which may hereafter be found, upon or under said lands" [2] includes the disputed substances of

---

[2] The reservation, in its entirety, is as follows:

> Grantor expressly reserves and excepts all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts,

helium, nitrogen, potash, petrified wood, and industrial clay. Although we find no Arizona cases construing such a reservation, similar provisions have been the source of extensive litigation in other jurisdictions.

All jurisdictions agree that in construing deeds, the court's role is to give effect to the intent of the contracting parties. *E.g., Shulansky v. Michaels*, 14 Ariz. App. 402, 405, 484 P.2d 14, 17 (1971). If the instrument is unambiguous, the intent of the parties must be discerned from the four corners of of the document. *E.g., Pass v. Stephens*, 22 Ariz. 461, 466, 198 P. 712, 714 (1921). If, however, the instrument is ambiguous, then extrinsic evidence of intent is admissible. *Id.*, 198 P. at 714.

But beyond agreeing on these basic principles of construction, courts have adopted varying approaches to ascertain what substances the parties intended to include in a general mineral reservation. Courts have focused their analysis on the proper definition of "mineral" with widely divergent results. Because of the importance of this issue in Arizona, we believe it appropriate to summarize some of the common approaches used in other jurisdictions.

Some courts find the term mineral [3] to be inherently (and always) ambiguous and admit extrinsic evidence to determine the parties' intent. In Colorado, for example, extrinsic evidence is admissible to show what the word mineral means "in the vernacular of the mining world, the commercial world and [to] landowners at the time of the grant, and whether the particular substance

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wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands.

[3] Throughout this opinion the term "mineral" will be used to refer to general mineral reservations regardless of the precise terminology employed. Courts have not differentiated among reservations of "all minerals," "minerals," "minerals of whatever kind," "all minerals whatsoever," etc.

was so regarded as a mineral." *Morrison v. Socolofsky*, 43 Colo. App. 212, 213, 600 P.2d 121, 122 (1979) (quoting *Farrell v. Sayre*, 129 Colo. 368, 373, 270 P.2d 190, 193 (1954)). Thus, in determining whether gravel was included within a reservation of "oil, gas and other minerals," the *Morrison* court concluded that evidence regarding the geological location of gravel with respect to the surface, the impact on the surface of extracting the gravel deposits, the nature of the use of the surface estate, and testimony of geologists-consultants in the gravel industry and of agricultural lenders and landowners on the common meaning of the term mineral at the time of the conveyance, were all properly admissible as bearing on the parties' intent. *Id.* at 214, 600 P.2d at 122.

Likewise the Arkansas courts find the term mineral to be ambiguous and require the admission of extrinsic evidence as to whether the substance at issue would be considered a mineral in the common commercial speech and usage at the time of the conveyance. *See, e.g., Thomas v. Markham & Brown, Inc.*, 353 F. Supp. 498 (E.D. Ark. 1973) (pulaskite stone not considered a mineral at the time of the conveyance); *Middleton v. Western Coal & Mining Co.*, 241 F. Supp. 407 (W.D. Ark. 1965) ("other minerals" does not include oil and gas).

A second general approach used by many jurisdictions is to find the term mineral to be unambiguous. Under this view, a grant or reservation containing the word mineral is found to completely sever the mineral estate from the surface estate. *Amoco Prod. Co. v. Guild Trust*, 636 F.2d 261, 265 (10th Cir. 1980), *cert. denied*, 452 U.S. 967, 101 S. Ct. 3123, 69 L. Ed. 2d 981 (1981) (oil and gas are minerals). In *Union Pac. Land Resources Corp. v. Moench Inv. Co.*, 696 F.2d 88 (10th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S. Ct. 1776, 76 L. Ed. 2d 348 (1983), the court found a reservation in a conveyance by the Union Pacific Railroad Company, a

successor to a federally-chartered corporation, to be unambiguous. The deed reserved to the railroad all "coal and other minerals." Applying Wyoming law, the court found the term minerals was unambiguous and included oil and gas. *Id.* at 93. Other courts use the doctrine of *ejusdem generis* to make the term unambiguous.[4] *Allen v. Farmers Union Co-Op. Royalty Co.*, 538 P.2d 204 (Okla. 1975).

Despite the lack of ambiguity, many of these courts still admit extrinsic evidence to ascertain whether the substance at issue is commercially valuable, commonly regarded as a mineral, and/or whether extraction of the substance would result in surface destruction. For example, in *Geothermal Kinetics, Inc. v. Union Oil Co.*, 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (1977), the court found the reservation of "all minerals" reflected the general intent to reserve "those commercially valuable, underground, physical resources of the property." *Id.* at 62, 141 Cal. Rptr. at 882. The court described the expectation of the parties as being that the enjoyment of the mineral estate "would not destroy the surface estate and would involve resources distinct from the surface soil." *Id.*, 141 Cal. Rptr. at 882. The trial court found that the "mining" of geothermal steam would not substantially destroy the surface of the property. *Id.* at 61, 141 Cal. Rptr. at 881-82.

Some of these jurisdictions determine that all commercially valuable substances that are commonly understood to be within the technical and/or practical mean-

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[4] *Ejusdem generis* is essentially a rule of construction whereby the term minerals is limited to substances of the same species as minerals previously enumerated. Thus, a lease of "natural gas, petroleum and other mineral substances" would include only those minerals related to oil and gas in nature. *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973). Some courts that determine the term mineral is ambiguous also employ *ejusdem generis* to define what substances are within a general mineral reservation. *See Keller v. Ely*, 192 Kan. 698, 391 P.2d 132 (1964).

ings of the term mineral are included in a general mineral reservation, even though development of these substances would result in surface destruction. *See, e.g., Moser v. United States Steel Corp.*, No. B-9735 (Tex. Sup. Ct. June 27, 1984); *New Mexico & Ariz. Land Co. v. Elkins*, 137 F. Supp. 767 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956). But other courts refuse to include substances whose extraction would result in surface destruction or which possess no distinguishing characteristics from the surface itself. *E.g., Wulf v. Shultz.*

Perhaps because of the disparate results produced by the above approaches, some courts have concluded that the term mineral may be ambiguous or unambiguous depending upon the circumstances of the case. Thus, in Kansas, a reservation of "all of the oil, gas and other minerals in and under, and that may be produced from" the land was ambiguous as to commercial clay, *Hans v. Great Bend Brick & Tile Co.*, 172 Kan. 478, 241 P.2d 475 (1952); but a lease of "natural gas, petroleum and other mineral substances" unambiguously excluded limestone, coal, clay, gypsum, gravel, rock and dirt under the doctrine of *ejusdem generis*. *Wulf v. Shultz.* In Kentucky, a reservation of all local and mineral rights unambiguously includes oil and gas, *Kentucky-West Virginia Gas Co. v. Browning*, 521 S.W.2d 516 (Ky. App. 1975), but a reservation of minerals, oil, and gas is ambiguous with respect to clay and sandstone constituting about 75% of the subsurface. *Cumberland Mineral Co. v. United States*, 513 F.2d 1399 (Ct. Cl. 1975).

Finally, some courts rely on legislative intent or rules of construction to determnie the extent of a mineral reservation. *E.g., Watt v. Western Nuclear, Inc.*, —— U.S. ——, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983) (the term minerals under the Stock-Raising Homestead Act of 1916 includes gravel). California courts have utilized state legislation regulating mineral and geothermal resources

to aid in the interpretation of the term mineral. *Pariani v. State*, 105 Cal. App. 3d 923, 164 Cal. Rptr. 683 (1980). In Colorado and Washington, grants are to be construed against the grantor. *Bell Petroleum Co. v. Cross V. Cattle Co.*, 492 P.2d 80 (Colo. App. 1971); *Weyerhaeuser Co. v. Burlington Northern, Inc.*, 15 Wash. App. 314, 549 P.2d 54 (1976). North Dakota has a statute requiring reservations of certain substances to be specifically and separately set forth in the instrument. *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957). And in a very recent decision, Division Two of this court held that pantano clay was a mineral within the contemplation of Arizona's mineral leasing laws. *Tanner Cos. v. Arizona State Land Dept.*, 2 CA-CIV 4798 (Ariz. App. July 18, 1984). This holding is of little assistance in the case before us because it concerns the authority of the land department to lease state lands for mineral exploration—a case involving the department's power under an extensive statutory scheme. *See also State Land Dept. v. Tucson Rock & Sand Co.*, 107 Ariz. 74, 481 P.2d 867 (1971).

C. *Critique of Other Jurisdictions*

Each of the above approaches has its drawbacks. Jurisdiction utilizing the same general approach reach different conclusions as to what substances are minerals. Inconsistent results are even produced within a single jurisdiction. *E.g., compare United States v. 1,253.14 Acres of Land*, 455 F.2d 1177 (10th Cir. 1972) (under Colorado Law, "all minerals" includes sand and gravel) with *Morrison v. Socolofsky*, 43 Colo. App. 212, 600 P.2d 121 (1979) (reservation of "other minerals" did not include gravel).

Courts that hold mineral to be an ambiguous term are often thrust into a complex and hopeless search for the "true intentions" of the original contracting parties. With the passage of decades and a series of mesne con-

veyances, this task can be impossible.[5] And, as many courts have noted, attempting to discover the parties' specific intent regarding a substance that was unknown to anyone at the time of the original conveyance is antilogical. *E.g.*, *Northern Nat. Gas Co. v. Grounds*, 441 F.2d 704, 714 (10th Cir.), *cert. denied*, 404 U.S. 951, 92 S. Ct. 268, 30 L. Ed. 2d 267 (1971). The most consistent results produced by these cases are title uncertainty and the need to litigate each mineral reservation to determine what substances it encompasses.[6] "[T]he

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[5] The difficulties inherent in this approach are highlighted by the facts of this case. The land which is the subject of this lawsuit was initially held by Santa Fe Pacific. The land was conveyed in three separate transactions to Spurlock's predecessors. Spurlock eventually succeeded to the titles in all three transactions.

The negotiations for these transactions were handled by E. O. Hemenway on behalf of Santa Fe Pacific. He negotiated with Grace Porter about the sale to her; with Ray Cowden about the sale to Cowden Livestock Company; and with J. C. Wetzler about the sale to Spurlock & Wetzler. Mr. Hemenway and Mrs. Porter died before the commencement of these proceedings.

The difficulty in ascertaining the intent of the parties in the three transactions is apparent. Two of the principals are deceased. The remaining participants in the transactions were asked to testify as to their intent about events transpiring almost forty years ago. Much of the trial time was consumed by testimony concerning the intent of the parties to the three conveyances.

[6] The trial court reasoned that minerals is an ambiguous term because "[t]aking *minerals* from the general trichotomy of animal, vegetable or mineral, it means everything which is not animal or vegetable." Applying this logic, Spurlock argues that the reservation therefore consumes the grant and invalidates it.

The trial court's approach was repudiated by the United States Supreme Court over eighty years ago.

> [T]he scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 530, 23 S. Ct. 365, 367, 47 L. Ed. 575, 581 (1903). To apply the rule enunciated

courts ultimately determine the meaning of the word 'minerals,' and all too often the only reliable rule appears to be that the word 'minerals' means what the courts say it means." Reeves, *The Meaning of the Word "Minerals,"* 54 N.D.L. Rev. 419, 482 (1978).

> To hold the term 'other minerals' ambiguous as a matter of law appears at first glance to be a laudable attempt by the courts to give effect to the intentions of the grantor. However, this assumes that the grantor had a specific and identifiable intent that can be discovered. The discovery of the grantor's intent, particularly in a remote transaction, is difficult. The problem with the ambiguity approach is that it creates instant uncertainty about any conveyance using 'other minerals' or 'all minerals.' It is almost impossible for an outsider or prospective purchaser to detemine what was granted or reserved. The effect of this approach is to encourage or increase the amount of litigation to determine the scope of the grant or reservation.

Comment, *A Proposal for the Construction of "Other Minerals" in Idaho*, 18 Idaho L. Rev. 97, 104 (1982) (Comment).

To alleviate these problems, many courts find the term minerals to be unambiguous. Under this approach title uncertainty is minimized and courts are able to avoid the tortuous process of attempting to discover the parties' specific intent. *See, e.g., Moser v. United States Steel Corp.*, No. B-9735 (Tex. Sup. Ct. June 27, 1984).

> The policy considerations in favor of this interpretation are considerable. An established rule of law provides a reliable means of ascertaining mineral ownership. This certainty is important because of

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by the trial court would result in the reservation consuming the conveyance, a result certainly not intended by the parties. Thus, the animal, mineral, vegetable approach is not correct.

> the heavy investment of capital required to develop petroleum and other mineral resources. Without an established rule of law, the courts would necessarily be called upon to interpret numerous reservations. This is evident from the series of cases that result in states following Arkansas authority. With every new technology that develops a use for a particular gas or hard rock mineral, resort is made to the courts. Conservation of judicial resources is another valuable advantage of [this] rule.

Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 265 (10th Cir. 1980), *cert. denied*, 452 U.S. 967, 101 S. Ct. 3123, 69 L. Ed. 2d 981 (1981) (quoting *Amoco Prod. Co. v. Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978)).

This approach, however, is not always free from difficulty. In jurisdictions which attempt to narrowly define minerals as only those substances whose extraction does not result in surface destruction, courts must still examine scientific and geological evidence to determine the mineral composition of the land and the impact of mineral production on the surface estate. *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983). Courts employing a legal standard of those substances "technically or commonly understood" to be minerals may have to admit evidence of custom or usage. *See, e.g., New Mexico & Ariz. Land. Co. v. Elkins*, 137 F. Supp. 767 (D.N.M.), *appeal dismissed*, 239 F.2d 645 (10th Cir. 1956).

Furthermore, the unambiguous approach may result in "ignoring the intent of parties which might have been discovered through diligent examination of extrinsic evidence." Comment at 101. This problem is exacerbated in jurisdictions employing *ejusdem generis* to arbitrarily and often artificially limit the substances included within

the term mineral.[7] *Allen v. Farmers Union Co-op. Royalty Co.*, 538 P.2d 204 (Okla. 1975) (reservation of "all oil, gas & mineral rights" does not include copper, silver, gold or any other metallic ores under *ejusdem generis*); *Hammett Oil Co. v. Gypsy Oil Co.*, 95 Okla. 235, 218 P. 501 (1921) ("oil and gas" does not include casing head gas).

D. *Conclusion*

1. Ownership

On balance, however, we believe the better reasoned approach is to treat the term minerals as unambiguous. Thus, it becomes the court's duty to determine the extent of a general reservation as a matter of law, without resorting to extrinsic evidence to try to establish any unexpressed, subjective intent of the parties. In this context, we believe a reservation of "all minerals whatsoever" reflects a *general* intent of the parties to sever the surface estate from the underlying mineral estate. *Maynard v. McHenry*, 271 Ky. 642, 113 S.W.2d 13 (1938). It indicates that the parties intended to create two distinct, co-existing, and individualy valuable estates. Thus, the grantor retains ownership of all commercially valuable substances separate from the soil, while the grantee assumes ownership of a surface that has value in its use and enjoyment. *See Watt v. Western Nuclear, Inc.*, —— U.S. ——, ——, 103 S. Ct. 2213, 2226-29, 76 L. Ed. 2d 400, —— (1983). The grantor further retains ownership of mineral substances that are unknown at the time of the conveyance. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951, 92

[7] A related problem with the use of *ejusdem generis* is the difficulty some courts have in determining what is the common characteristic among the minerals enumerated in order to apply the doctrine to disputed substances. *See, e.g., Western Dev. Co. v. Nell*, 4 Utah 2d 112, 288 P.2d 452 (1955); *see generally* Comment at 107-08.

S. Ct. 268, 30 L. Ed. 2d 267 (1971). This approach is consistent with the views expresed by the leading commentators. As Professor Eugene Kuntz observed:

> When a general grant or reservation is made of all minerals without qualifying language, it should be apparent that the parties intended to sever the entire mineral estate from the surface estate, leaving the respective owners of each estate with an estate which is enjoyable in a special manner. The manner of enjoyment of the mineral estate is through extraction and removal of substances from the earth, whereas the enjoyment of such substances as are necessary for the use of the surface, and these respective modes of enjoyment should be taken into account in arriving at the proper subject matter of each estate. The severance of 'minerals' generally should be construed to sever from the surface ownership all substances presently valuable in themselves, apart from their location in the earth, whether their presence is known or not known, and all substances which become valuable through the development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

1 E. Kuntz, *A Treatise on the Law of Oil and Gas* § 13.3 at 305-06 (1962); Comment, *The Meaning of "Minerals" in Grants and Reservations*, 30 Rocky Mtn. L. Rev. 343, 357 (1958); *see generally* R. Pruitt, *Mineral Terms—Some Problems in Their Use and Definition*, 11 Rocky Mtn. Min. L. Inst. 1 (1966).

2. Surface Destruction

Ownership of the mineral estate, however, is not the only issue which must be addressed in construing a mineral reservation. We must also determine what rights the mineral owner possesses to develop his estate. We

recognize that in order for both the surface and mineral estates to co-exist and retain their individual value, some accommodation between the respective owners is necessary.

In general, the owner of the mineral estate possesses the incidental right of entering, occupying, and utilizing the surface to explore for and develop the underlying minerals. 58 C.J.S. *Mines and Mineral* § 159 (1948). If the grant or reservation specifically authorizes surface destruction by the mineral owner, then courts should give effect to this intention.[8] Rarely, however, is such a right expressly conferred in the conveying instrument. Nevertheless, the court should examine the four corners of the document and give effect to any specific provisions regulating the use of the surface estate by the mineral owner. *See* Reeves, *The Meaning of the Word "Minerals,"* 54 N.D.L. Rev. 419, 442, 450-53 (1978); *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957).

In the absence of such provisions, the court should focus its analysis on the substances reserved or granted. With respect to minerals specified in the conveyance or minerals commercially known to exist at the time of the conveyance, reasonable destruction of the surface estate is permissible. *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973). The enumeration of such minerals indicates a specific intent on the part of the contracting parties that these substances would be fully developed. In essence, the surface owner knew of and agreed to this burden on his estate. It is logical to assume that parties intending to sever the mineral from the surface estate would contemplate some surface destruction in the development of substances which were commonly known to be commercially valuable minerals at the time of the con-

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[8] The reservation in this case grants Santa Fe Pacific the express right to use the surface for "digging, drilling and working of any mines or wells." See Section IV. B., *infra*.

veyance. *Schwarz v. State*, 658 S.W.2d 822 (Tex. App. 1983).

However, no such specific intent can be found with respect to substances which were unknown or had no commercial value at the time of the conveyance. *See, e.g., Pariani v. State*, 105 Cal. App. 3d 923, 930, 164 Cal. Rptr. at 683, 687 (1980); *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 714. The holder of the mineral estate owns such substances, but his development of these resources must not substantially interfere with the surface owner's estate. Only in this way can the general intention of the parties to create and enjoy two co-existing, individually valuable estates be given effect.

Many jurisdictions have recognized that the mineral owner's rights to develop his estate are limited when they infringe upon the surface owner's use and enjoyment of the land itself. Generally, courts solve this conflict by determining that the term minerals excludes substances whose extraction would destroy the surface. For example, in *Farrell v. Sayre*, 129 Colo. 368, 270 P.2d 190 (1954), the Supreme Court of Colorado refused to include sand and gravel in a reservation of "all mineral and mineral rights." Emphasizing that most of the surface was composed of sand and gravel, the court concluded that the contracting parties could not have intended to, in effect, "nullify the grant." Such a result would be tantamount to saying that the grantor retained the entire estate, the deed served no useful purpose, and the grantee received nothing. *Id.* at 372-73, 270 P.2d at 192. *See also Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (limestone); *Christensen v. Chromalloy Am. Corp.*, —— Nev. ——, 656 P.2d 844 (1983) (barite); *New Mexico and Arizona Land Co. v. Elkins Ranch, Inc.*, No. 74-235 (D.N.M. Dec. 3, 1974) (limestone); *State Land Bd. v. State Dept. of Fish &*

Game, 17 Utah 2d 237, 408 P.2d 707 (1965) (sand and gravel).[9]

While this approach protects the surface owner's estate, it is not necessarily an equitable solution to the problem. By refusing to include such substances in the definition of mineral, ownership of such commercially valuable deposits passes to the surface owner. The surface owner himself is then free to extract and commercially produce the substance. This result appears to contravene the parties' original intention that the grantor retain the ownership and profit potential of the mineral resources. Comment, *The Meaning of "Minerals" in Grants and Reservations*, 30 Rocky Mtn. L. Rev. 343, 351 (1958).

The Supreme Court of Alabama distinguished between the ownership itself of a mineral and the incidental rights of the mineral owner to utilize the surface to produce it in *Bibby v. Bunch*, 176 Ala. 585, 58 So. 916 (1912). Recognizing that shale was a mineral and its ownership was retained by the grantor under a reservation of "all minerals and mining rights," the court nonetheless refused to allow shale extraction because of the resultant surface destruction. *Id.* at 588, 58 So. at 917-18. The court concluded that while the mineral owner had the right to some reasonable use of the surface to procure underlying minerals, that right was subservient to the rights of the surface owner to have his estate maintained in its natural condition. *Id.* at 589, 58 So. at 917. *See also New Mexico and Ariz. Land Co. v. Elkins*, 137 F. Supp. 767, 773 (D.N.M.), *appeal dismissed*, 239 F.2d

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[9] Indeed, concern for surface destruction is paramount in the minds of many courts which are called upon to interpret mineral reservations. In our view, the issue of surface destruction is more properly examined as an adjunct to the question of how the mineral estate owner is to exercise his right of ownership. To consider surface destruction as an element of the ownership issue results in inconsistent and varying results which are evidenced in the many reported decisions.

645 (10th Cir. 1956) (finding uranium and thorium to be minerals, but reserving to the surface owner a cause of action against the mineral owner for destruction of his surface interests); *Moser v. United States Steel Corp.*, No. B-9735, *slip op.* at 7 (Tex. Sup. Ct. June 27, 1984).

We believe the distinction drawn by the *Bibby* court is a critical one. It comports with the general intention of the parties to sever the mineral from the surface estate. It gives ownership of commercially valuable substances distinct from the soil to the mineral owner. Yet it also recognizes that rights incidental to that mineral ownership are not unlimited. Thus, as to unspecified minerals, not known to be commercially valuable at the time of the conveyance, the mineral estate owner must not destroy or substantially interfere with the surface owner's right to use and enjoy his land by the mining or taking of minerals.

In the present case, only the issue of ownership rights under the general mineral reservation is before us.[10] Issues relating to the effect of extraction of the disputed substances upon the surface estate have not been briefed or argued before this court. Nor do the judgments below purport to rule on these matters. Accordingly, we do not believe it appropriate for this court to speculate as to whether or not production of any minerals would substantially interfere with the surface estate.

3. Holding

Under the principles expressed herein, we hold that the term minerals as used in this reservation is unambiguous. A reservation of "all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found" indicates the parties' general intention to

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[10] Santa Fe Pacific did not claim ownership of sand and gravel under the general mineral reservation either in the trial court or on appeal. Ownership of sand and gravel was claimed under another provision in the conveyance. This issue is addressed separately.

sever the mineral from the surface estate. No specific intent to limit this reservation is found within other provisions of the deeds nor is contrary extrinsic evidence of intent admissible to vary its effectiveness.

As a matter of law, we hold that helium,[11] nitrogen potash, industrial clay, and petrified wood are minerals and that Santa Fe Pacific retained ownership of them under the general mineral reservation. See *supra* note 2. All are inorganic, commercially valuable substances which are distinct from the soil itself. As we have previously discussed, the fact that the original contracting parties may have been unaware of the existence or value of these minerals at the time of the conveyance is irrelevant to the question of *ownership*.[12]

With respect to sand and gravel, Santa Fe Pacific claims title by virtue of another reservation in the deeds. This reservation permitted Santa Fe Pacific to come upon the surface and take sand and gravel for "railroad purposes." Because specific mention is made of "gravel and ballast," the foregoing discussion concerning the general mineral reservation is not applicable to these substances. The trial court found that Santa Fe Pacific "has abandoned any right it may have had to take sand and gravel for railroad purposes." Santa Fe Pacific has not raised on appeal any issue concerning error with regard to this finding. Thus, the trial court's judgment quieting title to the sand and gravel in favor of Spurlock is affirmed.

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[11] Even if we had not determined that the reservation completely severed the subsurface estate in favor of Santa Fe Pacific, the use of the term "gas" in the reservation would reserve the helium and nitrogen in favor of the railroad. *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 715; *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

[12] As discussed herein, this knowledge is only relevant to the mineral owner's rights to burden the surface estate in the course of developing and producing these mineral.

III. *DE JURE* AND *DE FACTO* DISSOLUTION; *ULTRA VIRES*

All of the judgments in this consolidated action recite that the reservation clause in the deeds from Santa Fe Pacific to Spurlock's predecessors in interest "is void and unenforceable." This ruling is apparently based upon the trial court's conclusion that Santa Fe Pacific was *de jure* and *de facto* dissolved and that the conveyances were therefore *ultra vires* acts. Immediately after the jury verdicts were read the trial judge stated:

> THE COURT: So that we leave the courtroom in a position to carry on the post-verdict proceedings, the Court will now enter a ruling on the corporate existence of Santa Fe, and it is the Court's finding that Santa Fe Pacific was de jure and de facto dissolved; that the acts of the defendants were ultra vires, consistent with all of the theories propounded by plaintiffs, Spurlocks.
>
> . . .
>
> MR. GILBERT: Would you give that ruling again? I missed part of that.
>
> THE COURT: I had indicated that the Court found that Santa Fe Pacific was de jure and de facto dissolved, that the acts were therefore ultra vires—
>
> MR. GILBERT: What acts, Your Honor?
>
> THE COURT: To the extent that they involved any issue in this lawsuit. If there are theories consistent with that that I've overlooked in that simple statement of findings, they would also be adopted.

The trial court's ruling was apparently based upon Spurlock's contention that Santa Fe Pacific had been *de jure* and *de facto* dissolved at the time it conveyed the lawsuit lands to Spurlock's predecessors in interest. Spurlock also argued successfully to the trial court that pursuant to a 1902 federal law, Act of June 27, 1902, ch.

1159, 32 Stat. 405 (1902 Act), Santa Fe Pacific was required to convey the lawsuit lands to the Atchison, Topeka and Santa Fe Railway Company. Thus, Spurlock contends that since Santa Fe Pacific was not empowered to retain title to these lands under the 1902 Act, it could not have been the legal owner of these lands when it subsequently conveyed them to Spurlock's predecessors.[13] Alternatively, Spurlock argues that Santa Fe Pacific's continued ownership of these lands and/or its conveyances to Spurlock's predecessors were *ultra vires* acts under the terms of the 1902 Act. We find it unnecessary, however, to decipher historical events which transpired eighty years ago because we conclude that Spurlock may not challenge the legal existence of Santa Fe Pacific nor complain that the conveyances were *ultra vires*.

A. *De Jure Dissolution*

The power of Congress to charter corporations to effectuate its lawful purposes is well established. *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316, 4 L. Ed. 579 (1819). Congress, in exercising those powers, has incorporated railroad corporations, including the Santa Fe Pacific. Act of March 3, 1897, ch. 374, 29 Stat. 622. Furthermore, "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized." *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32-33, 60 S. Ct. 15, 18, 84 L. Ed. 11, 16 (1939). "[A] power to create implies a power to preserve. . . . [A] power to destroy, if wielded by a

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[13] Exhibits admitted at trial establish that in 1903, Santa Fe Pacific actually conveyed its railroad operating properties to the Atchison, Topeka & Santa Fe Railway Company and its land grant lands to the Santa Fe Pacific Development Company. In 1904, the Santa Fe Pacific Development Company conveyed the lawsuit lands back to Santa Fe Pacific. Spurlock refers to certain fraudulent transfers by Santa Fe Pacific, but we find nothing in the record to sustain that contention.

different hand, is hostile to, and incompatible with these powers to create and to preserve." *McCulloch v. Maryland*, 4 Wheat. (U.S.) at 426, 4 L. Ed. at 606.

The respective supremacies of the state and national governments in their particular spheres must be observed in regard to their power to create and destroy corporations. Neither may terminate the existence of a corporation of the other. *State ex rel. Wilcox v. Curtis*, 35 Conn. 374, 378 (1868). Therefore, "no court can declare a forfeiture of franchise or a dissolution of a corporation except the courts of the jurisdiction which created it." J. Beale, *The Law of Foreign Corporations* § 821 (1904). The state courts must, therefore, look to federal law to determine whether a national, congressionally incorporated corporation, has been dissolved *de jure*. *See generally* 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7971 (rev. perm. ed. 1979) (Fletcher).

Spurlock has been unable to point to any federal enactment which revokes the corporate charter of Santa Fe Pacific. Instead, Spurlock argues that *de jure* dissolution is effectively accomplished by the 1902 Act. We disagree with Spurlock's strained interpretation of this legislation. The act authorized Santa Fe Pacific

> to sell or lease its railroad and other property, including all rights, powers, privileges, grants, and franchises, to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such purchaser or lessee shall take, hold, and use the railroad and property sold or leased subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants,

> and franchises relating to said railroad and property; or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company . . . .

32 Stat. at 405. The 1902 Act authorizes Santa Fe Pacific to transfer its railroad and properties to the Atchison, Topeka and Santa Fe Railway Company. The Act does not dissolve Santa Fe Pacific. Nor do we believe it appropriate for the trial court or this court to conjure an unexpressed congressional intent to nullify the corporate existence of the very corporation whose powers Congress was expressly clarifying.

B. *De Facto Dissolution*

Spurlock has argued that Santa Fe Pacific is *de facto* dissolved by virtue of its failure to exercise the rights accorded to it by its articles, or the federal act creating it. This contention is legally and factually unsound.

First, Spurlock has pointed to nothing in the federal law creating Santa Fe Pacific which would even remotely suggest that its corporate existence could be challenged in the state courts. Indeed, the power to dissolve a corporation must find its authority in the law of the sovereign creating the corporation. As in Section III.A., *supra*, we find no federal authority granting to the states the power to dissolve Santa Fe Pacific.

Second, even if Congress had given the states the power to dissolve Santa Fe Pacific, the facts in this case would not sanction the exercise of that power. *De facto* dissolution, in contrast to *de jure* dissolution, is largely a question of fact. The issue is what acts will give rise to a proper determination of corporate nonuse such that a court may declare such corporation *de facto* dissolved. The mere fact that a corporation has stopped doing business does not necessarily constitute a *de facto* dissolution. *Greenville Nat'l Exch. Bank v. Nussbaum*,

154 S.W.2d 672, 674 (Tex. App. 1941). A corporation may cease to exist for all practical purposes, and yet not be dissolved as a matter of law. *See Eastern Grain Elevator Corp. v. McGowan*, 95 F. Supp. 40 (W.D.N.Y. 1950). A corporation does not pass out of existence because it has become insolvent or has lost its property and ceased to carry on business. *Lucas v. Swan*, 67 F.2d 106 (4th Cir. 1933). And finally, the mere transfer of corporate assets is not sufficient to work a dissolution. *E.g., Hunn v. United States*, 60 F.2d 430 (8th Cir. 1932). Only a "total voluntary abandonment of its franchise [charter]" is sufficient to work a *de facto* dissolution. *Id.* at 432.

Contrary to Spurlock's contention, the evidence in this case indicates that Santa Fe Pacific has actively engaged in business from 1897 to the present. Letters, leases and other documents both from and to employees of Santa Fe Pacific evidence the ongoing business of Santa Fe Pacific in the 1940's and 1950's. Santa Fe Pacific offered into evidence minutes of several directors' and stockholders' meetings which reflect that the company was engaging in business. Similarly, the United States continued to recognize the existence of Santa Fe by issuing patents to it which are in evidence in this case.

Further, since 1904, Santa Fe Pacific has been involved in many litigated cases relating to its land grant holdings. Its existence has never been questioned in these suits. *See, e.g., United States v. Santa Fe Pac. R.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *Santa Fe Pac. R. Co. v. Work*, 267 U.S. 511, 45 S. Ct. 400, 69 L. Ed. 764 (1925); *Santa Fe Pac. R. Co. v. Cord*, 14 Ariz. App. 254, 482 P.2d 503, *cert. denied*, 404 U.S. 912, 92 S. Ct. 229, 30 L. Ed. 2d 185 (1971). In *New Mexico ex rel. Caledonian Coal Co. v. Baker*, 196 U.S. 432, 25 S. Ct. 375, 49 L. Ed. 540 (1905), the United States Sureme Court discussed the fact that Santa Fe Pacific had conveyed away its railroad property and was in the busi-

ness of administering its land grants. Nothing in the opinion states that there was anything improper about this arrangement or that Santa Fe Pacific had ceased to be an existing corporation. Thus, we can see no factual basis for the trial court's ruling that Santa Fe Pacific has been dissolved *de facto*.

Finally, even if inactivity by Santa Fe Pacific could somehow constitute *de facto* dissolution, Spurlock would be estopped from denying the company's corporate existence. First, in each complaint, Spurlock alleged that Santa Fe Pacific is an existing corporation. One who sues a corporation as such or who has pleaded that an opposing party is a corporation, has elected to treat that party as a corporation and cannot deny its corporate existence. 8 Fletcher § 3944; *see also American Zinc Prods. Co. v. Sanders*, 175 Ark. 133, 142, 298 S.W. 857, 860 (1927).

Second, Spurlock and his predecessors have dealt with Santa Fe Pacific since the early 1940's as an existing corporation by entering into contracts and leases with Santa Fe Pacific, accepting deeds from Santa Fe Pacific and dealing with Santa Fe Pacific's lessees and accepting surface damages from them. Parties who contract with or otherwise deal with an entity as a corporation are estopped from denying the corporate existence of that entity in a subsequent lawsuit. *Exum Walker, M.D. P.C., Pension Trust v. Joanna M. Knox & Assocs. Inc.*, 132 Ga. App. 12, 13, 207 S.E.2d 570, 572 (1974); *see Associated Students v. Arizona Board of Regents*, 120 Ariz. 100, 103, 584 P.2d 564, 567 (App. 1978).

C. *Ultra Vires Acts*

The trial judge ruled that because Santa Fe Pacific was *de jure* or *de facto* dissolved, the conveyances to Spurlock's predecessors in title were *ultra vires*. But the trial court's holding is a non sequitur. An *ultra vires* act is one outside the corporation's power as found directly

or impliedly in its articles of incorporation. *See Lurie v. Arizona Fertilizer & Chem. Co.*, 101 Ariz. 482, 421 P.2d 330 (1966). Thus, in order for a corporation to perform an *ultra vires* act it must necessarily exist. Having concluded that Santa Fe Pacific had been dissolved, it was logically impossible for the trial court to conclude that "therefore" its conveyances of the lawsuit lands were *ultra vires.*

In any event, Spurlock has no standing to raise a claim that the conveyance by Santa Fe Pacific were *ultra vires.* "[F]ederal corporations derive their existence and powers from acts of Congress, and ordinarily, proceedings to question the right of such corporations to exercise the corporate franchise or powers should be undertaken by the United States." 5 Fletcher § 2336. *See, e.g., First Nat'l Bank v. Missouri*, 263 U.S. 640, 660, 44 S. Ct. 213, 216, 68 L. Ed. 486, 494 (1924).

In summary, we conclude that (1) Congress has not dissolved Santa Fe Pacific; (2) Santa Fe Pacific is not *de facto* dissolved; and (3) Spurlock may not complain that the conveyances of the lawsuit lands by Santa Fe Pacific were *ultra vires.*

IV. ADVERSE POSSESSION AND RULES AGAINST PERPETUITIES

A. *Adverse Possession*

Santa Fe Pacific contends, as an alternative basis for reversal, that it acquired title to certain of the minerals by adverse possession. In light of the holding in Section II., *supra*, we need not reach this contention. Spurlock argues, however, that regardless of how the mineral reservation is construed the judgments should be sustained because he acquired title to the mineral estate by adverse possession. We disagree.

After the surface estate has been severed from the underlying mineral estate, title to the minerals cannot be

acquired by adverse possession of the surface alone.[14] See *generally Annot., 35 A.L.R.2d 124,* 154-55 (1954). Adverse possession requires an actual and visible appropriation of the mineral estate, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. A.R.S. § 12-521(A). Where there has been a severance of the mineral and surface estate, such as in this case, "title by adverse possession can be acquired to the mineral rights, but all the essential elements of adverse possession must exist . . . . The exploration for minerals and mining operations . . . must be open, notorious, continuous and hostile." *McCoy v. Lowrie,* 42 Wash. 2d 24, 26-27, 253 P.2d 415, 417 (1953). *See Lehfeldt v. Adams,* 130 Mont. 395, 303 P.2d 934 (1956). Mining for domestic purposes is insufficient to establish the requisite elements of adverse possession. *Mountain Mission School, Inc. v. Buchanan Realty Corp.,* 207 Va. 518, 151 S.E.2d 403 (1966). Similarly, the occasional taking of minerals, *White v. McNabb,* 140 Ky. 828, 131 S.W. 1021 (App. 1910), or taking from "time to time," *Central Trust Co. v. Harless,* 108 W. Va. 618, 152 S.E. 209 (1930), are likewise insufficient.

Turning to the facts of this case, it is clear that as to the disputed minerals, Spurlock did not acquire title by adverse possession. First, with respect to helium, nitrogen and potash, Spurlock does not contend that he produced these minerals or gained title to them through adverse possession. Second, with respect to industrial clay and petrified wood, there is some evidence that Spurlock has taken these minerals off the land. This evidence shows, however, that the taking by Spurlock was intermittent and erratic and not of a sufficiently continuous nature to establish title by adverse possession.

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[14] Spurlock contends that because the deed conveyances of the lawsuit lands were void, his claim of title to the surface estate is predicated upon the doctrine of adverse possession. But this contention has been rejected. See Section III., *supra.*

B. *Rule Against Perpetuities*

In light of our holding that title to the disputed substances lies with Santa Fe Pacific, it is also necessary to address the propriety of the trial court's ruling that Santa Fe Pacific's reserved right to use the surface to locate and remove minerals is in reality a repurchase option which violates the rule against perpetuities and the rule against unreasonable restraints on alienation. Each of the deeds conveying the lawsuit lands to Spurlock's precedessors provided that Santa Fe Pacific reserved the right:

> [T]o use so much of the surface . . . as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands. Grantor, or its successors or assigns, will pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the surface of all lands appropriated under this exception and reservation, which price shall be equal to the average price per acre paid for all the lands above described, together with the fair value of the buildings and permanent improvements, if any, on the land the surface of which is so appropriated. If the parties cannot agree upon such fair value it shall be fixed by three appraisers, of whom each party shall appoint one and the two so appointed shall appoint the third.

Little time need be spent in establishing that the foregoing does not violate the rule against perpetuities or any rule prohibiting unreasonable restraints on alienation.

The reservation merely states what would otherwise be an implied right to reasonably use the surface in order

to obtain "enjoyment" of the mineral estate. *See Keville v. Hollister Co.*, 29 Cal. App. 3d 203, 105 Cal. Rptr. 238 (1972). In short, the reservation is simply not an option to repurchase the fee title of the surface owner, as claimed by Spurlock, but rather merely a provision for compensation to the surface owner for the reserved right of use incidental to the mineral reservation.

V. CONCLUSION

In conclusion, we hold that the mineral reservation is unambiguous and reflects the intent of the parties to completely sever the mineral estate from the surface estate. Thus, helium, nitrogen, potash, industrial clay and petrified wood are part of the mineral estate and have been reserved by Santa Fe Pacific.[15] With respect to sand and gravel, however, the trial court found that Santa Fe Pacific had abandoned its claim of ownership. Because Santa Fe Pacific has not disputed that ruling on appeal, the judgment granting title to the sand and gravel in Spurlock is affirmed.

We further hold that the trial court erred in ruling that the deed reservation was void in its entirety because Santa Fe Pacific was dissolved *de jure* or *de facto* or that the conveyances were *ultra vires*. Additionally, Spurlock has not acquired the mineral estate by adverse possession. Furthermore, Santa Fe Pacific's reserved right to use the surface for mining activities does not violate the rule against perpetuities nor does it constitute an unreasonable restraint on alienation.

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[15] Santa Fe Pacific has filed a motion for an award of attorney's fees "incurred in that portion of the underlying action in the Superior Court relating" to its claim of title to the helium. Santa Fe Pacific's claim for fees is based upon A.R.S. § 12-1103(B). We need not decide whether a prevailing defendant-counterclaimant in a quiet title action is entitled to fees because even if Santa Fe Pacific could establish its entitlement to fees, in the exercise of our discretion we would decline to award it fees.

Accordingly, we reserve the lower court's judgments quieting title to helium, nitrogen, potash, industrial clay and petrified wood in Spurlock. We reverse the judgments of conversion against Santa Fe Pacific and Kerr-McGee. We affirm the judgment quieting title in sand and rock to Spurlock. On remand, the trial court is directed to enter judgments quieting title to helium, nitrogen, potash, industrial clay and petrified wood in Santa Fe Pacific.

/s/ Bruce Meyerson
BRUCE MEYERSON
Judge

CONCURRING:

/s/ Levi Ray Haire
LEVI RAY HAIRE
Presiding Judge

/s/ William E. Eubank
WILLIAM E. EUBANK
Judge

APPENDIX B

SUPERIOR COURT OF ARIZONA

APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation; and KERR-McGEE CORPORATION, a Delaware corporation,

Defendants.

JUDGMENT

(4779)

(Helium)

The plaintiffs, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock his wife ("Spurlocks") brought this action against Santa Fe Pacific Railroad Company ("Santa Fe") and Kerr-McGee Corporation ("Kerr-McGee") to quiet title to the helium located on or beneath the land owned by the Spurlocks which land

is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto and to recover damages for the helium removed from the Exhibit A land.

Among the many issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest, to wit: Cowden Livestock Company, Grace Porter, and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977 that the re-entry clause contained in the first paragraph of the reservation clause set forth on Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms on the nonadvisory issues. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issues submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the helium located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil,

gas, coal and minerals whatsoever" reserved unto Santa Fe the helium located on or beneath the lands described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that while the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest did not have a mutually agreed upon specific intent regarding Santa Fe's ownership of the helium the parties did have a general intent that Santa Fe was not the owner of the helium.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the dates of the transactions between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories, that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever," could not reserve unto Santa Fe the helium located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the helium located on or beneath the Exhibit A land in the Spurlocks and assessed damages in the amount of Six Hundred Sixty-Four Thousand Five Hundred Two Dollars ($664,502.00) and punitive damages in the amount of Twenty Million Dollars ($20,000,000.00) against Santa Fe and damages in the amount of Two Hundred Fifty Thousand Three Hundred Five Dollars ($250,305.000) and punitive damages in the amount of Four Hundred Eighty-Seven Thousand Seven Hundred Thirty-Two Dollars ($487,732.00) against Kerr-McGee.

After the jury returned its answers to interrogatories and its general verdict, the Court then ruled upon legal

issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

After the jury returned its verdict the Spurlocks filed a motion for prejudgment interest on the actual damages assessed against Santa Fe and Kerr-McGee. On September 30, 1981, the Court granted the Spurlocks' motion for prejudgment interest in the amount of Three Hundred Twenty-Seven Thousand Seven Hundred Thirty-Five Dollars ($327,735.00) as against Sante Fe and in the amount of One Hundred Twenty-Three Thousand Nine Hundred One Dollars ($123,901.00) as against Kerr-McGee. The Court further ruled that the prejudgment interest awarded by the Court would not be subject to post judgment interest.

The Spurlocks, after the jury returned the verdict, moved to add Santa Fe Industries, Inc., ("Industries"), a corporation, as a defendant for the purpose of entering judgment against it upon the ground that Santa Fe was merely an operating division and the alter ego of Industries. Industries had been previously joined as a defendant pursuant to an order of the Court dated June 27, 1980. However, the Court thereafter granted Industries' motion to dismiss it from the action before the trial commenced. The Court ruled on September 30, 1981, that the Court's prior ruling dismissing Industries would not have been entered if the Court had then possessed the knowledge of the relationship between Industries and Santa Fe that was developed during the trial of the case. Further, the Court ruled that Santa Fe was the alter ego of Industries and that Industries had received a fraudulent transfer from Santa Fe but that Industries could not be added as a defendant for the entry of judgment.

On September 30, 1981, the Court entered an order finding that the advisory answers to the interrogatories

submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered an order adopting the answers. Also, on September 30, 1981, the Court further entered an order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict on the non advisory issues and directed the entry of judgment thereon.

More than twenty (20) days prior to bringing the action to quiet the title to the helium, the Spurlocks had requested Santa Fe and Kerr-McGee to execute a quit claim deed thereto and tendered to each of Santa Fe and Kerr-McGee Five Dollars ($5.00) for execution and delivery of the deed in compliance with A.R.S. § 12-1103.B., but each of Santa Fe and Kerr-McGee refused to execute the quit claim deed. After the trial of the case, the Spurlocks filed a motion for an award of attorney's fees pursuant to A.R.S. § 12-1103.B. The Court ordered an evidentiary hearing to determine whether the Spurlocks were entitled to attorney's fees and the amount thereof. After the evidentiary hearing the Court read and considered extensive memoranda filed by the Spurlocks, Kerr-McGee and Santa Fe. The Court then ruled that the Spurlocks were entitled to attorney's fees in the amount of Four Hundred Thousand Dollars ($400,000.00) as against Santa Fe and Three Hundred Twenty-Five Thousand Dollars ($325,000.00) as against Kerr-McGee.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon general intent as to which of them would own the helium located on or beneath the land described on Exhibit A and that the intended owner of the helium was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the helium located on or beneath the land described on the attached Exhibit A; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of reentry contained in the first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the rule against restraints upon alienation and the rule against perpetuities; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Santa Fe is the alter ego of Industries and there were fraudulent transfers of property from Santa Fe to Industries; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the helium located on or beneath the lands described on the annexed Exhibit A and the title to said helium is hereby quieted in the Spurlocks and that Kerr-McGee and Santa Fe have no estate, title, or interest therein, and that the title to the helium in or under the land described on the

annexed Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Kerr-McGee or Santa Fe and each of Kerr-McGee and Santa Fe, and any persons claiming by, under or through them, are barred and forever estopped from claiming or having any estate, title, interest, lien or right in or to the helium in or under said land adverse to the Spurlocks; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs Spurlocks have and recover judgment against the defendant Santa Fe in the sum of Six Hundred Sixty-Four Thousand Five Hundred Two Dollars ($664,502.00) as and for actual damages; and the sum of Twenty Million Dollars ($20,000,000.00) as and for punitive damages, together with interest on the foregoing sums at the highest legal rate from June 20, 1981, until paid, together with the Spurlocks' costs incurred herein and attorney's fees in the amount of Four Hundred Thousand Dollars ($400,000.00), with the costs and attorney's fees to bear interest at the highest legal rate from the date of this judgment until paid; plus the sum of Three Hundred Twenty-Seven Thousand Seven Hundred Thirty-Five Dollars ($327,735.00) as and for prejudgment interest, which sum shall not bear interest; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs Spurlocks have and recover judgment against the Defendant Kerr-McGee in the sum of Two Hundred Fifty Thousand Three Hundred Five Dollars ($250,305.00) as and for actual damages, and the sum of Four Hundred Eighty-Seven Thousand Seven Hundred Thirty-Two Dollars ($487,732.00) as and for punitive damages, together with interest on the foregoing sums at the highest legal rate from June 20, 1981, until paid, together with the Spurlocks' costs incurred herein and attorney's fees in the amount of Three Hundred Twenty-Five Thousand Dollars ($325,000.00) with the costs and attorney's fees to bear interest at the highest

legal rate from the date of this judgment until paid; plus prejudgment interest in the amount of One Hundred Twenty-Three Thousand Nine Hundred One Dollars ($123,901.00), which sum shall not bear interest.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is awarded in favor of Santa Fe and Kerr-McGee and against the Spurlocks on Counts Three, Four, Five, Six and Seven of the Spurlocks' Fourth Amended Complaint.

The Court expressly determining herewith that there is no just reason for delay, the Court herewith expressly directs entry of the foregoing Judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

EXHIBIT "A"

PROPERTY DESCRIPTION:

PARCEL NO. 1: Lots 1, 2, 3, 4, 5, and 6; the Northeast quarter of the Southwest quarter; the Southeast quarter of the Northwest quarter; the Southwest quarter of the Northeast quarter and the North half of the Southeast quarter of the Northeast quarter of Section 6, Township 17 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 2: All of Sections 1, 3, 5, 7, 9, 11, 13, 15 and 17 and 19; the West half of the West half of Section 29, and all of Section 31, Township 18 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 3: Sections 1, 3, 4, 5, 6, 7, and 18 lying North of the Puerco Rim, in Township 18 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 4: All of Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34 and 35, in Township 19 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 5: All of Sections 6, 7, and Southwest quarter of the Southeast quarter of Section 8, all of Sections 13, 14, 15, 17, 18, 19, 21, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, and 35, Township 19 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 6: All of Section 1; the South half of Section 2; all of Section 3, EXCEPTING THEREFROM a strip of land 400 feet in width adjoining the Southeastly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company, extending across

said Section; all of Section 9, EXCEPTING THEREFROM a strip of land 400 feet in width adjoining the Southeasterly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company, and a strip of land 100 feet in width adjoining the Northwesterly line of the said 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company across the North half of said Section; all of Sections 10, 11, 12, 13, 14, and 15; all of Section 17, EXCEPTING THEREFROM all of the triangular portion of the Northwest quarter of said Section 17 lying Northwest of the Northwesterly line of the 200 foot wide right of way of the Atchison, Topeka and Santa Fe Railway Company; the East half of the Southeast quarter of the Northwest quarter; the North half of the Northeast quarter; and the Northwest quarter of the Southwest quarter of Section 18, Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXCEPT all those portions of Section 18 describes as follows: The original 200 foot right of way of the Atchison, Topeka and Santa Fe Railroad; and

EXCEPT a 100 foot strip of land adjoining the Northwesterly line of the Atchison, Topeka and Santa Fe Railway Company's 200 foot wide right of way and extending across the North half of the Northeast quarter of said Section 18; and

EXCEPT that portion of Lot 3 (Northwest quarter of the Southwest quarter) of said Section 18, lying between said Northwesterly line of 200 foot right of way and a line drawn parallel from the Northeast corner of said Lot 3 to a point in the West line of said Lot, distant 200 feet Northwesterly at right angles from said 200 foot right of way, All of Sections 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34 and 35, all in Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXCEPT a strip of land 306 feet in width situated in the Northwest quarter of the Northwest quarter of Section 18, Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, State of Arizona, lying within the right of way of the relocated Holbrook-Lupton Interstate Highway. Said strip of land lying 210 feet on the northwesterly side of and 96 feet on the Southeasterly side of the following described Eastbound center line of said highway:

BEGINNING at the point of intersection of the Eastbound center line of the relocated Holbrook-Lupton Interstate Highway with the West line of Section 28, at approximate Highway Engineer's Station 825+05, from whence the Northwest corner of said Section 28 bears Northerly approximately 520 feet; thence North 67 degrees 09 minutes 00 seconds East traversing said Section 28 and Sections 21, 22 and 23 approximately 12,678 feet, to a point lying in said Section 23 at Highway Engineer's Station P.C. 951+83.34; thence Northeasterly along a 0 degrees 12 minute curve, concave to the Northwest, a distance of 7808.34 feet, to Highway Engineer's Station P.T. 1029+91.68; thence North 51 degrees 32 minutes 00 seconds East traversing Section 13, a distance of 3356.42 feet, to a point on the East line of said Section 13, at Highway Engineer's Station P.O.T. 1063+48.1, from whence the Northeast corner thereof bears Northerly 53.4 feet; thence continuing North 51 degrees 32 minutes 00 seconds East traversing Sections 18 and 7, a distance of 6914.3 feet, to a point on the East line of said Section 7, at Highway Engineer's Station P.O.T. 1432+62.4, from whence the Northeast corner thereof bears Northerly 1231.3 feet.

PARCEL NO. 7: All of Section 31, Township 20 North, Range 28 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 8: All of Section 10, containing 640.00 acres, section 12, containing 640.00 acres and section

14, containing 640.00 acres in Township 20 North, Range 26 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

PARCEL NO. 9: Section 7, containing 626.10 acres, and Lots 1, 2, 3, N-½ NE-¼ and E-½ NW-¼ Section 18, less original 200 foot right of way of the Atchison, Topeka and Santa Fe Railway Company, also less a 100 foot strip of land adjoining the northwesterly line of the Atchison, Topeka and Santa Fe Railway Company's said 200 foot wide right of way and extending across the north half of the northeast quarter of said section 18, containing an area of 5.20 acres, more or less, and also less that portion of Lot 3 of said Section 18 lying between said northwesterly line of 200 foot right of way and a line drawn from the northeast corner of said Lot 3 to a point in the west line of said lot distant 200 feet northwesterly at right angles from said 200 foot right of way, containing an area of 5.00 acres more or less, containing 238.25 acres. Containing in the aggregate eight hundred sixty-four and thirty-five hundredths (864.35) acres, more or less. Township 20 North, Range 27 East of the Gila and Salt River Base and Meridian, Apache County, Arizona.

EXHIBIT B

Grantor expressly reserves and excepts all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands. Grantor, or its successors or assigns, will pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the surface of all lands appropriated under this exception and reservation, which price shall be equal to the average price per acre paid for all the lands above described, together with the fair value of the buildings and permanent improvements, if any, on the land the surface of which is so appropriated. If the parties cannot agree upon such fair value it shall be fixed by three appraisers, of whom each party shall appoint one and the two so appointed shall appoint the third.

This conveyance is made subject to and upon condition that in the event that Grantor, or its successors or assigns, or The Atchison, Topeka and Santa Fe Railway Company, or its successors or assigns, or any railroad company at least a majority of whose stock it owns, may any time hereafter desire to construct across the premises hereinabove described, any railroad tracks, telegraph and telephone lines, or other electric wire lines, oil or water pipe lines, roadways, ditches, flumes or aqueducts, or to operate on said premises gravel and ballast pits and quarries and take material therefrom for railroad purposes, the right of way for any such tracks, telegraph, telephone or other electric wire lines, pipe lines, roadways, ditches, flumes and aqueducts, of sufficient width for the proper

protection, maintenance and operation thereof, and the land necessary and convenient for the operation of such gravel and ballast pits and quarries and the taking of material therefrom for railroad purposes, may be appropriated by any such Company desiring to construct such tracks, wire lines, pipe lines, roadways, ditches, flumes or aqueducts, or to operate such gravel and ballast pits and quarries, upon such Company paying or offering to pay to Grantee, or the legal representatives, heirs, successors or assigns of Grantee, a fixed price per acre for the land so appropriated, which price shall be equal to the average price per acre paid for all the land above described, together with the fair value of all buildings and permanent improvements constructed upon the land so appropriated; and Grantee, or the legal representatives, heirs, successors or assigns of Grantee, will convey to such Company such appropriated right of way upon demand and tender of payment as aforesaid.

SUPERIOR COURT OF ARIZONA

APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,

Plaintiffs,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, an corporation,

Defendant.

JUDGMENT

(4998)

(Sand and Gravel)

The plaintiffs, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife ("Spurlocks") brought an action against Santa Fe Pacific Railroad Company ("Santa Fe") to quiet title to the sand and gravel located on or beneath the land owned by the Spurlocks which land is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which

appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest, to wit: Cowden Livestock Company, Grace Porter, and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock which reservation clause appears on the attached Exhibit B.

Santa Fe admitted that the only interest it claimed in the sand and gravel located on the Exhibit A land was the right to take sand and gravel for railroad purposes under the second paragraph of the reservation clause on Exhibit B.

After an eight month jury trial the Court submitted a written interrogatory to the jury pursuant to Rule 39(1) ARCP on the advisory issue and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issue submitted to the jury related to whether Santa Fe had abandoned any right it may have had under the reservation clause, Exhibit B, to take sand and gravel for railroad purposes from the Exhibit A land.

On June 20, 1981, the jury determined in response to the written interrogatory that Santa Fe had abandoned any right it may have had to take sand and gravel for railroad purposes.

The jury returned a general verdict quieting title to the sand and gravel located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answer to the interrogatory and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforce-

able in its entirety. The Court further ruled on September 30, 1981, that Santa Fe was the alter ego of Santa Fe Industries, its parent company, and that Santa Fe Industries received fraudulent transfer from Santa Fe.

On September 30, 1981, the Court entered an order finding that the advisory answer to the interrogatory submitted to the jury pursuant to Rule 39(1) ARCP was either consistent with, or not inconsistent with the Court's finding on the same issue of fact and entered an order adopting the answer. Also, on September 30, 1981, the Court further entered an order that the answer of the jury to the written interrogatory was not inconsistent with the general verdict and directed the entry of judgment thereon.

More than twenty (20) days prior to bringing the action to quiet the title to the sand and gravel and Spurlocks had requested Santa Fe to execute a quit claim deed thereto and tendered to Santa Fe Five Dollars ($5.00) for execution and delivery of the deed in compliance with A.R.S. § 12-1103.B but Santa Fe refused to execute the quit claim deed. After the trial of the case the Spurlocks filed a motion for the award of attorney's fees pursuant to A.R.S. § 12-1103.B. The Court ordered an evidentiary hearing to determine whether the Spurlocks were entitled to attorney's fees and the amount thereof. After the evidentiary hearing the Court read and considered extensive memoranda filed by the Spurlocks and Santa Fe. The Court then ruled that the Spurlocks were entitled to attorney's fees in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00).

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth in the annexed

Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and

IT IS FURTHERED ORDERED, ADJUDGED AND DECREED that Santa Fe has abandoned any right it may have had to take sand and gravel for railroad purposes; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the sand and gravel located on or beneath the land described on the annexed Exhibit A and the title to such sand and gravel is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the sand and gravel in or under the land described in the attached Exhibit A is owned by the Spurlocks and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest or right in or to the sand and gravel in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks have and recover judgment against Santa Fe in the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) as and for attorney's fees, together with interest thereon at the rate of ten percent (10%) per annum from the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks have and recover from Santa Fe all of their costs.

The Court expressly determining herewith that there is no just reason for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

Nos. 4779
4910
4936
4961
4949
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff, and
Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants and
Counterclaimants.

JUDGMENT

(4910)

(Nitrogen)

The plaintiff and counterdefendant, Santa Fe Pacific Railroad Company ("Santa Fe") brought an action to quiet title to the nitrogen located on or beneath land owned by the defendants and counterclaimants, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife, ("Spurlocks") which land is located in Apache County, Arizona and is specifically described on

the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their counterclaim, sought to have the title to the nitrogen quieted in them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977 that the re-entry clause contained in the first paragraph of the reservation clause set forth on Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The interrogatories submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R.C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the nitrogen located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the nitrogen located on or beneath the lands described on the annexed Exhibit A.

On June 20, 1981 the jury determined in response to the written interrogatories that the parties to the trans-

actions between Santa Fe and the Spurlocks' predecessors in interest had no mutually agreed upon specific intent as to which of them would own the nitrogen but did have general intent that Santa Fe was not to own the nitrogen located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the date of the agreements for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the nitrogen located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the nitrogen located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981 the Court entered an order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered

an order adopting the answers. Also, on September 30, 1981 the Court further entered an order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel and having read and considered all of the briefs and memorandum submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest, is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon general intent as to which of them would own the nitrogen located on or beneath the land described on Exhibit A and that the intended owner of the nitrogen was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the nitrogen located on or beneath the land described on the attached Exhibit A; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of re-entry contained in the

first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore, void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the nitrogen located on or beneath the land described on the annexed Exhibit A and the title to such nitrogen is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the nitrogen in or under the land described on the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe, and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the nitrogen in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs herein.

The Court expressly determining herewith that there is no just reasons for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Judge of Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE

Nos. 4779
4910
4936
4949
4961
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff/Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants/Counterclaimants.

JUDGMENT

(4949)

(Petrified Wood)

The Plaintiff/Counterdefendant, SANTA FE PACIFIC RAILROAD COMPANY ("Santa Fe") brought an action to quiet title to the petrified wood located on or beneath land owned by the Defendants/Counterclaimants, RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife, ("Spurlocks") which land is located in Apache

County, Arizona, and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their Counterclaim, sought to have the title to the petrified wood quieted to them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977, that the re-entry clause contained in the first paragraph of the reservation clause set forth in Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial, the Court submitted written interrogatories to the jury, pursuant to Rule 39(1) Arizona Rules of Civil Procedure, on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The advisory issues submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyance, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R. C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the petrified wood located on or beneath the land described in the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the petrified wood located on or beneath the land described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent that Santa Fe was not to own the petrified wood located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the dates of the agreements for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further, the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found in the answers to written interrogatories that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the petrified wood located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the petrified wood located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict, the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981, the Court entered an Order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1), Arizona Rules of Civil Procedure, were either consistent with, or not inconsistent with the Court's findings on the same

issues of fact and entered an Order adopting the answers. Also, on September 30, 1981, the Court further entered an Order that the answers of the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel, and having read and considered all of the briefs and memoranda submitted by the parties, and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe, to the Spurlocks' predecessors in interest, is void and unenforceable in its entirety; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent as to which of them would own the petrified wood located on or beneath the land described on Exhibit A and that the intended owners of the petrified wood was not Santa Fe; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, under such custom and usage, a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the petrified wood located on or beneath the land described on the attached Exhibit A; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of reentry contained in the

first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the petrified wood located on or beneath the land described on the annexed Exhibit A and the title to such petrified wood is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the petrified wood in or under the land described in the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the petrified wood in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs incurred herein.

The Court expressly determining herewith that there is no just reason for delay expressly directs entry of the foregoing Judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
THE HONORABLE PAUL G. ROSENBLATT
Judge of the Superior Court

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

Nos. 4779
4910
4936
4949
4961
4998

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff and Counterdefendant,

vs.

RANSOM THEODORE SPURLOCK and VERNIE MARIA SPURLOCK, his wife; and CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK, his wife,
Defendants and Counterclaimants.

JUDGMENT

(4961)

(Clay)

The plaintiff and counterdefendant, Santa Fe Pacific Railroad Company ("Santa Fe") brought an action to quiet title to the clay located on or beneath the land owned by the defendants and counterclaimants, Ransom Theodore Spurlock and Vernie Maria Spurlock, his wife; and Charles Patrick Spurlock and Nancy Jeneen Spurlock, his wife, ("Spurlocks") which land is located in Apache County, Arizona and is specifically described on the attached Exhibit A which is incorporated herein by reference thereto. The Spurlocks, in their counterclaim, sought to have the title to the clay quieted in them.

Among the many legal and factual issues presented was the interpretation and effect of a reservation clause which appeared in the deeds executed by Santa Fe to the Spurlocks' predecessors in interest which reservation clause appears on the attached Exhibit B.

The Court ruled on August 22, 1977, that the reentry clause contained in the first paragraph of the reservation clause set forth in Exhibit B violated the common law rule against restraints upon alienation and the rule against perpetuities.

After an eight month jury trial the Court submitted written interrogatories to the jury pursuant to Rule 39(1) ARCP on advisory issues and general verdict forms. The Court reserved unto itself certain legal issues concerning the validity and enforceability of the reservation clause on the annexed Exhibit B.

The interrogatories submitted to the jury related to whether the parties to the transactions between Santa Fe and the persons and entities from whom the Spurlocks had acquired the Exhibit A land by mesne conveyances, to-wit: Cowden Livestock Company, Grace Porter and the partnership of Spurlock and Wetzler taken in the name of R. C. Spurlock and Georganna Spurlock, ("Spurlocks' predecessors in interest") had a general or specific intent that Santa Fe was to be the owner of the clay located on or beneath the land described on the annexed Exhibit A and whether there existed a custom and usage under which a reservation of "all oil, gas, coal and minerals whatsoever" reserved unto Santa Fe the clay located on or beneath the land described on the annexed Exhibit A.

On June 20, 1981, the jury determined in response to the written interrogatories that the parties to the transactions between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent

that Santa Fe was not to own the clay located on or beneath the Exhibit A land.

The jury further found, in its answers to written interrogatories, that the terms used in the reservation clause, Exhibit B, were terms for which there was a custom and usage and that the custom and usage existed both in 1947 and 1951, being the date of the agreement for sale and the deeds between Santa Fe and the Spurlocks' predecessors in interest. Further the jury found, in response to the written interrogatories, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest. Finally, the jury found, in the answers to written interrogatories, that under the custom and usage which existed a reservation of "all oil, gas, coal and minerals whatsoever" could not reserve unto Santa Fe the clay located on or beneath the Exhibit A land.

The jury returned a general verdict quieting title to the clay located on or beneath the Exhibit A land in the Spurlocks.

After the jury returned its answers to interrogatories and its general verdict the Court then ruled upon legal issues affecting the validity and enforceability of the reservation clause (Exhibit B) in its entirety. The effect of the Court's ruling on those issues was that the reservation clause is, as a matter of law, void and unenforceable in its entirety.

On September 30, 1981 the Court entered an order finding that the advisory answers to the interrogatories submitted to the jury pursuant to Rule 39(1) ARCP were either consistent with, or not inconsistent with the Court's findings on the same issues of fact and entered an order adopting the answers. Also, on September 30, 1981, the Court further entered an order that the answers to the jury to the written interrogatories were not inconsistent with the general verdict and directed the entry of judgment thereon.

Now, therefore, the Court having heard and seen all of the evidence, and having heard and considered all of the arguments of counsel and having read and considered all of the briefs and memoranda submitted by the parties and being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the reservation clause which is set forth on the annexed Exhibit B and which appears in the deeds to the Exhibit A land from Santa Fe to the Spurlocks' predecessors in interest is void and unenforceable in its entirety; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties to the deeds between Santa Fe and the Spurlocks' predecessors in interest had a mutually agreed upon specific intent as to which of them would own the clay located on or beneath the land described on Exhibit A and that the intended owner of the clay was not Santa Fe; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms used in the reservation clause contained in the deeds between Santa Fe and the Spurlocks' predecessors in interest were terms for which there was a custom and usage, which custom and usage existed both in 1947 and in 1951, and further, that the custom and usage was applicable to the transactions between Santa Fe and the Spurlocks' predecessors in interest; and, further that a reservation of "all oil, gas, coal and minerals whatsoever" did not reserve title to the clay located on or beneath the land described on the attached Exhibit A; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of re-entry contained in the first paragraph of the reservation clause (Exhibit B) contained in the deeds from Santa Fe to the Spurlocks' predecessors in interest violated the common law rule against restraints upon alienation and the rule against perpetuities and, is therefore, void; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are the owners of all of the clay located on or beneath the land described on the annexed Exhibit A and the title to such clay is hereby quieted in the Spurlocks and Santa Fe has no estate, title or interest therein, and the title to the clay in or under the land described in the attached Exhibit A is owned by the Spurlocks free and clear of any claim or claims whatsoever of Santa Fe and any persons claiming by, under or through it, are barred and forever estopped from claiming or having any estate, title, interest, or right in or to the clay in or under said land adverse to the Spurlocks.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Spurlocks are awarded their costs incurred herein.

The Court expressly determined herewith that there is no just reason for delay expressly directs entry of the foregoing judgment.

DONE IN OPEN COURT this 24 day of May, 1982.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Judge of Superior Court

APPENDIX C

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

January 30, 1985

RE: SPURLOCK et ux et al vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. 1 CA-CIV 6938

Apache County Nos. C-4779, C-4910, C-4936, C-4961, C-4949 & C-4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 29, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED.

Justices Gordon and Cameron did not participate in the determination of this matter."

Record returned to the Court of Appeals, Division One, Phoenix, this 30th day of January, 1985.

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer, Hendricks & Victor

Glen D. Clark, Clerk, Court of Appeals, Division One

eh

APPENDIX D

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

March 6, 1985

RE: SPURLOCK vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. CA-CIV 6938

Apache County Nos. C-4779, C-4910, C-4936, C-4961, C-4949 & C-4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 5, 1985, in regard to the above-referenced cause:

"ORDERED: Petition to Recall Mandate = DENIED.

FURTHER ORDERED: Motion for Permission to file Motion for Reconsideration of Order Denying Petition for Review = DENIED.

FURTHER ORDERED: Motion for Reconsideration = DENIED as moot.

Justice Feldman voting to grant petition to recall mandate.

Justices Gordon and Cameron did not participate in the determination of this matter."

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq., Jack E. Evans, Ltd.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer Hendricks & Victor

eh

APPENDIX E

[SEAL]

SUPREME COURT
STATE OF ARIZONA
201 - West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

27 March 1985

RE: SPURLOCK et al vs. SANTA FE PACIFIC RAILROAD COMPANY et al

Supreme Court No. 17849-PR

Court of Appeals No. 1 CA-CIC 6938

Apache County Nos. C-4779, 4910, 4936, 4961, 4949 & 4998 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 26, 1985, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration = DENIED.

Justices Gordon and Cameron did not participate in the determination of this matter."

S. ALAN COOK, Clerk

To: Jack E. Evans, Esq.

Philip E. von Ammon, Esq., Donald R. Gilbert, Esq., and Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Robert L. Palmer, Esq., Ronald Kilgard, Esq., and James A. Bush, Esq., Martori, Meyer, Hendricks & Victor

pgk

APPENDIX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292, provides:

CHAP. CCLXXVIII.—*An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John B. Brown, [*et al.*] * * *; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States,

and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas, at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act, as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Atlantic and Pacific Railroad Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner Hall, in the city of Saint Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall

appoint, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, once a week for at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof, as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and in case of

their absence or inability any two of the officers of said board, shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer, and secretary shall then deliver over to said directors all the moneys, properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers, (when they are to be chosen.) and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad

Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate, with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby,

excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary

draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authoritzed to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, author-

ized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon

such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken as aforesaid shall be held by an infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failuure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint

an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

SEC. 13. *And be it further enacted,* That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act, shall, so soon, as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for

the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted*, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston,

New York, Cincinnati, Saint Louis, Memphis, and Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain

bona fide subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act.

SEC. 21. *And be it further enacted*, That whenever in any grant of land or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges, and pay of said directors, engineers, commissioners, or agents, shall be paid by the respective companies. Said directors, engineers, commissioners, or agents shall be paid for said services the sum of ten dollars per day, for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily travelled, in discharging the duties required of them, which per diem and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payment, no more patents for lands or other subsidies shall be issued to said company until these requirements are complied with.

APPROVED, July 27, 1866.

The Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19, provides:

CHAP. XXXIII.—*An Act to enable the Atlantic and Pacific Railroad Company to mortgage its Road.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seven, eighteen hundred and sixty six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: *Provided,* That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of foreclosure of said mortgage.

APPROVED, April 20, 1871.

The Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622, provides:

CHAP. 374.—An Act To define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-

one, concerning the Atlantic and Pacific Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever any mortgage made by the Atlantic and Pacific Railroad under and by virtue of Acts of Congress is foreclosed in any court of the United States or of any State or Territory thereof, and any sale of the road, equipment, lands, franchises, privileges, and other rights and property covered by said mortgage is made under a decree or decrees of such courts, the purchaser at any such sale or sales, and their associates or assigns, shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants, and franchises, including the franchise to be a corporation, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure; and the incorporation as hereby provided shall be completed and become effective whenever the said purchasers and their associates or assigns shall file with the Secretary of the Interior a certificate of incorporation hereunder, duly acknowledged, specifying the name of such new corporation, its president, and the names of its directors, the amount of its proposed capital stock and bonds, together with certified copy of the decree or decrees ratifying such sale; but such new company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject under its charter or Act of incorporation, and nothing in this Act shall be held to deprive the United States of any right or remedy they may at any time have had

against said Atlantic and Pacific Railroad Company; but nothing in this Act shall make such purchasers and their associates or such new corporation liable for any debts or claims or contracts of the old corporation except all debts, demands and liabilities which were due or owing by the old company, which were contracted, accrued, or were incurred or are due or owing for tickets and freight balances, or for wages, work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the repair, equipment, operation, or extension of said road and its branches so purchased, and all liabilities incurred by said old company in the transportation of freight and passengers thereon, including damages for injuries to employees or other persons, and to property, and which debts, demands and liabilities have accrued or upon which such had been brought or was pending, or judgment rendered, within twelve months prior to the appointment of a receiver or receivers in the foreclosure proceeding or since the appointment of any such receiver, but such liabilities shall not include any liabilities to other railroad companies except for tickets and freight balances: *Provided*, The capital stock of the corporation herein authorized shall be divided into shares each of the par value of one hundred dollars, and shall not exceed the amount of the mortgage debt due and unpaid at the time of the decree of foreclosure: *Provided*, That additional stock and bonds may be issued by the corporation upon the payment into its treasury therefor the full par value thereof in cash. No stock shall be issued until the Secretary of the Interior shall approve its issue and certify that it is issued in conformity to the provisions of this Act. The total stock issued under the provisions of this Act shall not exceed one hundred million dollars. But no stock shall be issued by said corporation, until such issue shall be approved by the Secretary of the Interior as actually representing money, labor or property, estimated at its actual cost value, at the full or par value of said issue of stock:

Provided further, That nothing herein contained shall be construed as making any additional grant of lands or other franchises to such successor corporation, or as a waiver of any rights of the United States now existing to enforce any forefeiture of lands heretofore granted to the said Atlantic and Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Atlantic and Pacific Railroad Company or of any purchaser or purchasers of said lands from said company: *Provided further*, That as a condition precedent to reorganization the purchasers of the railroad property and their associates shall relinquish in writing and convey to the United States (by a proper deed or instrument to be filed with and approved by the Secretary of the Interior within six months after the passage of this Act and before this Act shall take effect) all claim, right, title, and interest to all lands granted to the Atlantic and Pacific Railroad Company embraced within both the granted and indemnity limits, which were adjacent to and coterminous with the uncompleted portions of the road on the sixth day of July, eighteen hundred and eighty-six: *And provided further*, That in every case of failure of the title to any lands conveyed or contracted to be sold by said Atlantic and Pacific Railroad Company to any bona fide settler and occupant in a tract of six hundred and forty acres or less any and all rights of such purchaser or his assigns, in respect of such land, or in respect of the failure of such title, or in respect to the liability of said Atlantic and Pacific Railroad Company on any such contract, shall survive and may be enforced against such successor company with the same force and effect and in the same manner as against the Atlantic and Pacific Railroad Company; and such successor company, upon making compensation for such loss of title or failure to comply with the conditions of any such land contract, shall be subrogated to the rights of such purchaser in respect of the lands for which such compensa-

tion shall have been made: *And provided further*, That in case any uncompleted contracts for the purchase of said land shall be pending at the time of such foreclosure sale, such new company shall, upon payment to it of any unpaid balance of purchase money for such land at the time provided in such contracts for the sale thereof, convey and release to the holders of such contracts all its title, interest, and estate in and to the land embraced in such contracts.

SEC. 2. Where the line of such railway is now located within the limits of any state, or where such line is now located within a territory which may hereafter become a state, such state or such territory, when it shall become a state, shall be empowered to require such corporation to become incorporated within such state or states as may be provided by the laws thereof.

SEC. 3. That Congress shall at all times have the power to alter, amend, or repeal this Act.

APPROVED, March 3, 1897.

The Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405, provides:

CHAP. 1159.—An Act Authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchises, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Santa Fe Pacific Railroad Company, a corporation incorporated under the Act of Congress, approved March third, eighteen hundred and ninety-seven, entitled "An Act to define the rights of purchasers under mortgages authorized by an Act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," be, and it hereby is, authorized and empowered to sell or lease

its railroad and other property, including all rights, powers, privileges, grants, and franchises, to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such purchaser or lessee shall take, hold, and use the railroad and property sold or leased subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants, and franchises relating to said railroad and property, or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company: *Provided*, however, That said railroad shall remain as heretofore a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation, and subject also to all other rights of the United States.

SEC. 2. That from and after the passage of this Act the said Santa Fe Pacific Railroad Company, its successors or assigns, shall pay an annual tax at the rate of one hundred and seventy-five dollars per mile to the Territories of New Mexico and Arizona, respectively, for each mile of main track in said Territories, respectively, the same to be apportioned among the counties of said Territories in which said railroad is located according to the mileage in each county, respectively, and said taxes shall be in lieu of all other taxes on said property hereby authorized to be leased or sold and the rolling stock used thereon, but excepting the land-grant lands and the shops as hereinafter otherwise provided, and the payment of the said tax as to each Territory shall be made on or before the first day of December of every year after nineteen hundred and two, until it shall have been admitted into

the United States of America as a State: and that upon the admission of the said Territories of New Mexico and Arizona, or either of them, as States, the property hereby authorized to be transferred, situated therein, shall be subject to all the laws and regulations of either of the said States of New Mexico or Arizona in the same maner and to the same extent as any other railroad property situated therein. The payment of the said one hundred and seventy-five dollars a mile shall not extend to or apply to any of the land-grant lands owned by the said Santa Fe Pacific Railroad Company which are in no wise connected with the right of way and station grounds of said company, said land-grant lands to remain as now chargeable with taxes as assessed and collected under and by virtue of the laws of the said Territories of New Mexico and Arizona, and the shops situated at Albuquerque, New Mexico, including the machinery therein, and the lands upon which the same are situated, shall be assessed separately, and the taxes thereon paid annually according to the laws of New Mexico.

SEC. 3. That the sale or lease herein authorized shall be made on or before January first, nineteen hundred and four: otherwise this Act shall become inoperative for all purposes.

SEC. 4. That Congress shall at all times have power to alter, amend, or repeal this Act.

Approved, June 27, 1902.

Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 954-55, as originally promulgated, provided:

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be

paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in

interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Section 321 of the Transportation Act of 1940, as amended by Act of December 12, 1945, Pub. L. No. 256, 59 Stat. 606 (codified as amended at 49 U.S.C. § 10721 (1982)), provides:

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transpor-

tation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

Sec. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided, however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment.

Sec. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

Approved December 12, 1945.

APPENDIX G

New York, September 10, 1902.

A meeting of the Board of Directors of the Santa Fe Pacific Railroad Company was held at 12 o'clock M., this day.

There were present Messrs Ripley, Morawetz, Berwind, Cheney, Duval, Fowler, Gleed, Haven, Hayes, McCullough and Smith. (11)

President Ripley presided and Secretary Deming acted as Secretary of the meeting.

Approval of Minutes.

The minutes of the meeting of the Board of Directors held on August 6, 1902 were read aloud, and on motion duly made and seconded were approved.

Acceptance of Act of Congress, June 27, 1902, authorizing sale of property.

On motion duly made and seconded, it was

VOTED, that the Santa Fe Pacific Railroad Company hereby accepts the Act of Congress, approved June 27, 1902, entitled: "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad, property and franchises and for other purposes."

Approval of agreement for sale of property to The A.T. & S.F. Ry. Co.

An agreement dated June 30, 1902 was submitted between this Company, party of the first part, and The Atchison, Topeka and Santa Fe Railway Company, party of the second part, whereby this Company agrees to convey its property to The Atchison, Topeka and Santa Fe Railway Company and gives the right to use and operate the same on and after July 1, 1902.

On motion duly made and seconded, it was

VOTED, that the said agreement be approved and that the same be executed by the President in behalf of this Company and the corporate seal attested by the Secretary.

There being no further business, on motion the meeting was adjourned.

/s/ L. C. Deming
Secretary.

APPENDIX H

New York, May 6, 1903.

A meeting of the Board of Directors of the Santa Fe Pacific Railroad Company was held at 11:30 o'clock A.M. this day.

There were present Messrs Berwind, Cheney, Haven, McCullough, Morawetz, Smith and Steele. (7)

Upon motion, Mr. Haven presided and Secretary Deming acted as Secretary of the meeting.

Approval of Board Minutes Feb. 16, 1903.

The minutes of the meeting of the Board of Directors held on February 16, 1903 were read aloud and on motion duly made and seconded were approved.

Land Grant Lands. Approval of Deed of Conveyance to Santa Fe Pacific Development Co.

The General Counsel submitted a form of proposed deed to be executed by this Company conveying all its land grant lands to the Santa Fe Pacific Development Company, a corporation, all the stock of which, except the qualifying shares of Directors, is owned by this Company.

On motion duly made and seconded, it was

VOTED, that the execution of a deed substantially of the tenor of the draft now submitted conveying to the Santa Fe Pacific Development Company the lands and rights of this Company under Section 3 of the Act of Congress approved July 27, 1866 entitled "An Act to aid in the construction of a railroad and telegraph line from the States of Missouri and Kansas to the Pacific Coast," be and the same hereby is approved.

L.C.D.

Approval of Deed of Conveyance of Railroad & Property to the A.T. & S.F. Ry. Co.

The General Counsel also submitted a form of deed from this Company conveying to The Atchison, Topeka and Santa Fe Railway Company, as authorized by the Act of Congress of June 27, 1902, all the railroad and other property, including rights, powers, privileges, grants and franchises of this Company.

On motion duly made and seconded, it was

VOTED, that the execution of a deed substantially in the form now submitted conveying all the railroad and other property, including all rights, powers, privileges, grants and franchises of this Company to The Atchison, Topeka and Santa Fe Railway Company be approved, and that the officers of this Company be authorized to do all things necessary to carry the same into effect; it being understood that such deed is to be executed after the execution by this Company of a deed substantially in the form heretofore approved by this Board conveying to the Santa Fe Pacific Development Company the land grants of this Company.

There being no further business, on motion the meeting was adjourned.

/s/ L. C. Deming
Secretary

APPENDIX I

THIS INDENTURE, Made this 30th day of May, in the year One Thousand Nine Hundred and Three, by and between the SANTA FE PACIFIC RAILROAD COMPANY, (hereinafter the Santa Fe Pacific Company), a corporation created under and by virtue of an Act of Congress approved March 3, 1897, party of the first part, and the SANTA FE PACIFIC DEVELOPMENT COMPANY, (hereinafter called the Development Company), a corporation created under and by virtue of the laws of the State of California, party of the second part.

Whereas, by the Act of Congress approved July 27, 1866, entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," the Atlantic and Pacific Railroad Company was incorporated; and by section 2 of said act there was granted to said Atlantic and Pacific Railroad Company for the construction of a railroad and telegraph line, as proposed, the right of way through the public lands to the extent of one hundred feet in width on each side of said railroad where the same may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, sidetracks, turn-tables and water stations; and

Whereas, by section 3 of said Act of Congress there was granted to said Atlantic and Pacific Railroad Company for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, the alternate sections of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as in said section 3 provided; and

Whereas, thereafter said Atlantic and Pacific Railroad Company executed its certain mortgages or deeds

of trust, whereby it mortgaged and conveyed to the trustees therein named respectively, its railroad and telegraph line known as the Western Division of the Atlantic and Pacific Railroad, beginning at Albuquerque on the Rio Grande River, in the Territory of New Mexico, and thence extending to the Colorado River and thence by the most practicable and eligible route to the Pacific Ocean, together with its franchises, privileges and other rights and all other property of every description composing or pertaining to the said railroad and telegraph line, including the lands and rights granted to said Atlantic and Pacific Railroad Company by the aforesaid section 3 of said Act of Congress; and

Whereas, in certain causes thereafter instituted and pending in the courts of New Mexico, Arizona and California for the foreclosure of said mortgages or deeds of trust, such proceedings were had that the said railroad and telegraph line, franchises, privileges and other rights and all other property of every description pertaining to the said railroad and telegraph line, and also the lands and rights granted to said Atlantic and Pacific Railroad Company by said section 3 of said Act of Congress, were sold in pursuance of decrees entered in said causes, and such sale having been duly confirmed by said courts, were conveyed by Owen N. Marron, the special master appointed by said courts, unto Aldace F. Walker, R. Somers Hayes and Victor Morawetz, by deed dated the second day of June, 1897; and

Whereas, said Aldace F. Walker, R. Somers Hayes and Victor Morawetz accepted the provisions of the Act of Congress approved March 3, A.D. 1897, entitled: "An Act to define the rights of purchasers under mortgages authorized by an act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," and, by a proper deed or instrument filed with and approved by the Secretary of the Interior, as prescribed by said Act of

Congress, relinquished and conveyed to the United States of America all their claim, right, title and interest to all lands granted by the United States of America to the Atlantic and Pacific Railroad Company embraced both within the granted and indemnity limits which were adjacent to and coterminous with the uncompleted portions of said railroad of the Atlantic and Pacific Railroad Company on the 6th day of July, 1886; and

Whereas, said purchasers, Aldace F. Walker, R. Somers Hayes and Victor Morawetz, in accordance with said Act of Congress approved March 3, A.D. 1897, duly organized and constituted the Santa Fe Pacific Company, party of the first part hereto; and by deed dated the 24th day of June, A.D. 1897, duly conveyed to the Santa Fe Pacific Company all and singular all the said right, title and interest acquired by them in and to the said railroad and telegraph line, franchises, privileges and other rights and property of every description composing or pertaining to said railroad and telegraph line, including said lands and rights granted to said Atlantic and Pacific Railroad Company by said section 3 of said Act of Congress approved July 27, 1866, excepting, however, the claim, right, title and interest theretofore relinquished and conveyed by them, as aforesaid, to the United States of America; and

Whereas, thereafter by a certain deed dated December 24, 1898, Edward Wilder conveyed to the Santa Fe Pacific Company certain lands which theretofore had been granted to said Atlantic and Pacific Railroad Company by the aforesaid Act of Congress approved July 27, 1866, such lands having been theretofore sold and conveyed by the Atlantic and Pacific Railroad Company to George F. Crane and the title thereto having been acquired by the said Edward Wilder:

Now Therefore, This Indenture Witnesseth, that for and in consideration of the sum of One Dollar ($1) to it duly paid by the Development Company, at or before

the ensealing and delivery of these presents and of other valuable considerations, the receipt whereof is hereby acknowledged, the Santa Fe Pacific Company has granted, bargained, sold, assigned, released, conveyed confirmed and set over and by these presents does grant, bargain, sell, assign, release, convey, confirm and set over to the Development Company, its successors and assigns forever, all the right, title, interest, claim and demand of the Santa Fe Pacific Company in and to all lands, and all rights which were granted to the Atlantic and Pacific Railroad Company under and by virtue of said Section 3 of said Act of Congress approved July 27, 1866, including all lands for which patents have been granted or for which patents may hereafter be granted, whether such lands have been selected or surveyed or may hereafter be selected or surveyed, and whether such lands be located within the limits specifically designated in said Section 3 of said Act of Congress approved July 27, 1866, or be lands selected in lieu thereof not more than ten (10) miles beyond said limits; and including all lands to which the Santa Fe Pacific Company is or may be entitled to receive by way of indemnity in lieu of lands, within its place or indemnity limits, hereby conveyed;

EXCEPTING, HOWEVER, FROM THIS GRANT AND RESERVING unto the Santa Fe Pacific Company all the following described lands, viz:

The southeast quarter (S.E. ¼) of the northeast quarter (N.E. ¼) and the northeast quarter (N.E. ¼) of the southeast quarter (S.E. ¼) of Section six (6), Township twelve (12) north, Range eleven (11) west, New Mexico Base and Meridian, containing eighty (80) acres, in Valencia County, New Mexico Territory;

The southeast quarter (S.E. ¼) of the southwest quarter (S.W. ¼) of Section eight (8), Township eighteen (18) north, Range twenty-four (24) east, Gila

and Salt River Base and Meridian, containing forty (40) acres, in Apache County, Arizona Territory;

The northwest quarter (N.W. ¼) of Section twenty-one (21), Township eighteen (18) north, Range sixteen (16) east, Gila and Salt River Base and Meridian, in Navajo County, Arizona Territory;

Sections twenty-nine (29) and thirty-one (31), in Township twenty-one (21) north, Range nine (9) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section nineteen (19), Township twenty (20) north, Range seven (7) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section fifteen (15), in Township nineteen (19) north, Range six (6) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

Section eleven (11), and thirty-two and seventy-seven one-hundredths (32.77) acres in the northeast quarter (N.E. ¼) of Section ten (10), in Township twenty-one (21) north, Range five (5) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

The northeast quarter (N.E. ¼) of Section one (1), in Township twenty-one (21) north, Range three (3) east, Gila and Salt River Base and Meridian, in Coconino County, Arizona Territory;

The west half (W. ½) of the southeast quarter (S.E. ¼) of Section thirty-three (33), in Township twenty-two (22) north, Range two (2) east, of the Gila and Salt River Base and Meridian, containing eighty (80) acres, and a part of the southwest quarter (S.W. ¼) of Section thirty-three (33), Township twenty-two (22) north, Range two (2) east of the Gila and Salt River Base and Meridian, described as follows, to-wit: Beginning at the center of said Section and running thence

west six hundred (600) feet, thence south parallel with the west line of said Section to an intersection with the south line of said Section, thence east along the south line of said Section to the quarter corner between the southeast and southwest quarters of said Section, thence north on the quarter section line between the southeast and the southwest quarter of said Section to the point of beginning, containing thirty-six and four-tenths (36.4) acres, more or less, all of said land in Section thirty-three (33), Township twenty-two (22) north, Range two (2) east, Gila and Salt River Base and Meridian, being in Coconino County, Arizona Territory;

The northwest quarter (N.W. ¼) of Section thirty-one (31), in Township twenty-two (22) north, Range one (1) east, Gila and Salt River Base and Meridian, containing one hundred and sixty (160) acres, more or less, in Coconino County, Arizona Territory;

The northeast quarter (N.E. ¼) of the northeast quarter (N.E. ¼) of Section nine (9), in Township twenty-one (21) north, Range one (1) east, Gila and Salt River Base and Meridian, containing forty (40) acres, in Coconino County, Arizona Territory;

The north half (N. ½) of the northeast quarter (N.E. ¼) of Section three (3), in Township twenty-one (21) north, Range one (1) east, Gila and Salt River Base and Meridian, containing eighty (80) acres, in Coconino County, Arizona Territory;

The southwest quarter (S.W. ¼) of the northwest quarter (N.W. ¼) and the southeast quarter (S.E. ¼) of the southwest quarter (S.W. ¼) of Section three (3), in Township twenty (20) north, Range four (4) east, Gila and Salt River Base and Meridian, containing eighty (80) acres, in Coconino County, Arizona Territory;

The north half (N. ½) and the southwest quarter (S.W. ¼) of Section nine (9), in Township twenty (20)

north, Range four (4) east, Gila and Salt River Base and Meridian, containing four hundred and eighty (480) acres, in Coconino County, Arizona Territory;

The south half (S. ½) and the northeast quarter (N.E. ¼) of the southwest quarter (S.W. ¼) and the southeast quarter (S.E. ¼) and the south half (S. ½) of the northwest quarter (N.W. ¼) and the northwest quarter (N.W. ¼) of the southwest quarter (S.W. ¼) of Section four (4), Township twenty-one (21) north, Range one (1) west, of the Gila and Salt River Base and Meridian, containing four hundred (400) acres, in Coconino County, Arizona Territory;

The southeast quarter (S.E. ¼) of Section nine (9) and the southwest quarter (S.W. ¼) of Section ten (10), in Township twenty-two (22) north, Range five (5) west, of the Gila and Salt River Base and Meridian, containing three hundred and twenty (320) acres, in Yavapai, Arizona Territory;

The northwest quarter (N.W. ¼) of Section thirteen (13), all of Section fifteen (15), the west half (W. ½) of Section nine (9), the west half (W. ½) of Section three (3), all of Section twenty-three (23), and the northwest quarter (N.W. ¼) of Section thirty-five (35) all in Township fifteen (15) north, range eighteen (18) west, New Mexico Base and Meridian, in McKinley County, Territory of New Mexico.

And it is Hereby Expressly Understood and Declared that the Santa Fe Pacific Company excepts from this grant and reserves unto itself, that certain strip of land two hundred feet in width upon which its railroad is situated, being one hundred feet in width on each side of the center line of the main track of said railroad, and also all lands adjacent to such strip of land that now are used or occupied by the Santa Fe Pacific Company for station grounds, work shops, depots, machine shops, switches, side-tracks, turn-tables, water stations or other

purposes in connection with the maintenance or operation of its said railroad.

To Have and to Hold the said lands and land grants and all other property, real, personal and mixed, rights, assets and appurtenances, hereby conveyed or assigned or intended to be conveyed or assigned unto the Development Company, its successor or successors and assigns, forever.

And the Santa Fe Pacific Company hereby irrevocably constitutes and appoints the Development Company, its successors and assigns, the Attorney-in-fact of the Santa Fe Pacific Company at any and all times in the name or on behalf of the Santa Fe Pacific Company but at the sole cost and expense of the Development Company, to do any and all acts and things which the Santa Fe Pacific Company might or could lawfully do, for the purpose of perfecting or enforcing all the rights, titles, interests, claims, and demands hereby granted and conveyed or intended to be granted and conveyed, and to use the name of the Santa Fe Pacific Company for such purposes and also in and about any legal proceedings and suits, either at law or in equity, as the Development Company, in its discretion, may deem necessary or expedient, hereby ratifying and confirming all acts which the Development Company may do in the premises.

And the Santa Fe Pacific Company further covenants that from time to time upon the request of the Development Company it, the Santa Fe Pacific Company, will make, do, execute, acknowledge, and deliver all such further acts, deeds, and assurances in law as may be reasonably required for effectuating the intention of these presents, and for the better assuring and confirming unto the Development Company, its successors and assigns, all and singular the premises, property, and rights hereby conveyed or assigned, or intended so to be.

In witness whereof, on the day and year first above written the Santa Fe Pacific Company, party of the first part, has caused this indenture to be signed by its President, and its corporate seal to be hereunto affixed, and the same to be attested by its Secretary.

SANTA FE PACIFIC
RAILROAD COMPANY,

By /s/ E. P. Ripley
Its President.

[SEAL]

Attest:

/s/ L. C. Deming
Its Secretary.

Form accepted:

Victor Morawetz
General Counsel

STATE OF ILLINOIS,)
) ss.
COUNTY OF COOK.)

Be it remembered that on this 10th day of August, A. D. 1903, before me, Edward J. Engel, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared Edward P. Ripley, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as President of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument, and known to me to be such President, and as such President acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said Edward P. Ripley, being by me duly sworn, did depose and say that he is the President of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

/s/ Edward J. Engel
Notary Public

My Commission expires April 17, 1905.

[SEAL]

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.
BOROUGH OF MANHATTAN)

Be it remembered that on this 17th day of August, A. D. 1903, before me, D. J. Sheehan, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared L. C. Deming, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as Secretary of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument and known to me to be such Secretary, and as such Secretary acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said L. C. Deming, being by me duly sworn, did depose and say that he is the Secretary of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

/s/ D. J. Sheehan
Notary Public

[SEAL]

My Commission expires Mar. 30th, 1904.

I hereby certify that the foregoing is a true copy of the original, which has been recorded as follows:

Bernallilo	Co.,	N.M.	Nov.	4,	1903,	book	33,	folio	396.
Valencia	"	"	"	5	"	"	A14	"	154.
McKinley	"	"	"	2	"	"	2	"	574.
Sandoval	"	"	"	3	"	"	1	"	1.
San Juan	"	"	"	16	"	"	14	"	14.
Socorro	"	"	"	4	"	"	49	"	311.
Apache	"	Ariz.	"	24	"	"	12	"	1.
Navajo	"	"	"	16	"	"	3	"	304.
Coconino	"	"	Dec.	7	"	"	17	"	262.
Yavapai	"	"	Nov.	30	"	"	67	"	41.
Mohave	"	"	"	17	"	"	16	"	20.
Yuma	"	"	Jan.	2,	1904	"	16	"	507.

January 18, 1904. Secretary, Santa Fe Pacific Development

APPENDIX J

THIS INDENTURE, made this 1st day of July in the year one thousand nine hundred and three by and between the SANTA FE PACIFIC RAILROAD COMPANY, a corporation created under and by virtue of an act of Congress approved March 3, 1897, (hereinafter called the "Santa Fe Pacific Company,") party of the first part, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation created under and by virtue of the laws of the State of Kansas, (hereinafter called the "Atchison Company,") party of the second part:

WHEREAS the Santa Fe Pacific Company is a corporation created and existing under and by virtue of an act of Congress approved March 3, 1897, entitled "An Act to define the rights of purchasers under mortgages authorized by an act of Congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company"; and

WHEREAS in and by an act of Congress, entitled "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchise and for other purposes," approved June 27, 1902, the said Santa Fe Pacific Company was authorized and empowered to sell or lease its railroad and apurtenances, and all rights, powers, privileges, grants and franchises had or used in connection therewith to the Atchison Company; and

WHEREAS the said Santa Fe Pacific Company is the owner of a line of constructed railroad and telegraph together with switches, side-tracks, terminals, freight houses and yards, and real estate, properties and rights connected therewith, extending from Isleta Junction, on the west side of Rio Grande River, in the Territory of New Mexico, westwardly across the Territories of New Mexico and Arizona to the Colorado River, and across the same to its terminus at or near Needles, in the County of San Bernardino, the State of California, and entire line

from Isleta Junction to Needles being about five hundred sixty-five and two-tenths (565.2) miles in length; and

WHEREAS the Atchison Company is the owner of lines of constructed railroad and telegraph described as follows: A line extending from Chicago in the State of Illinois, in a southwesterly direction through the States of Illinois, Iowa, Missouri, Kansas, Colorado and the Territory of New Mexico to a point of connection with the said railway of the Santa Fe Pacific Company at or near Isleta Junction, New Mexico; and a line of railroad extending from a point of connection with the railroad of the Southern Pacific Railroad Company south of Kern City in the State of California, in a westerly and northwesterly direction to the City of San Francisco, in said State, and operates as lessee, under lease for a long term of years, that part of the railroad of the Southern Pacific Railroad Company extending from a point of connection with the railroad of the said Santa Fe Pacific Company at Needles to Mojave, in the State of California, from which point to a point of connection with the railroad of the Atchison Company south of said Kern City and said Atchison Company has acquired the right to use and operate the tracks of the said Southern Pacific Railroad Company between said last named points for a long term of years; and

WHEREAS the said lines of railroad of the Atchison Company form a continuous line with the said line of railroad of the Santa Fe Pacific Company and all the said lines of railroad aforesaid are operated as continuous and connected lines of railway and are not in competition with or parallel to each other; and

WHEREAS the Santa Fe Pacific Company has heretofore issued, and there are now outstanding and unpaid, its First Mortgage Four Per Cent. bonds for the aggregate principal sum of sixteen million dollars ($16,000,000), secured by a certain Mortgage or Deed of Trust dated the fifteenth day of July, 1897, executed by said Santa

Fe Pacific Company to Union Trust Company of New York, as Trustee; and

WHEREAS the Directors of the Santa Fe Pacific Company and the Directors of the Atchison Company have agreed upon the sale by the Santa Fe Pacific Company to the Atchison Company and the purchase by the Atchison Company from the Santa Fe Pacific Company of all its railroad and other property, including all rights, powers, privileges, grants and franchises, upon the terms and conditions in this indenture set forth, and the owners and holders of more than two-thirds (⅔) in amount of the capital stock of the Atchison Company, at a meeting of the stockholders of such company, called for that purpose, upon due notice given in the manner provided by law, have assented to and approved the same; and

WHEREAS the Atchison Company owns all the shares of the capital stock of the Santa Fe Pacific Company, except thirteen (13) shares held by the directors thereof, and has expressly in writing approved of and assented to the execution of this indenture and the sale hereunder upon the terms and conditions of this indenture; and said directors, individually have all in like manner approved of and assented thereto;

NOW THEREFORE THIS INDENTURE WITNESSETH that for and in consideration of the premises and of the sum of One Dollar ($1) to it duly paid by the Atchison Company at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Santa Fe Pacific Company has granted, bargained, sold, assigned, released, conveyed, confirmed and set over, and by these presents does grant, bargain, sell, assign, release, convey, confirm and set over to the Atchison Company and its successors and assigns, forever, all and singular, the railroad and other property, including all rights, powers, privileges, grants and franchises of the Santa Fe Pacific Company, and including the rail-

road and other property more particularly described as follows:

All the railroad and telegraph line heretofore by deed, dated June 24, 1897, conveyed by Aldace F. Walker, R. Somers Hayes and Victor Morawetz to said Santa Fe Pacific Company, beginning at Isleta Junction, on the west side of Rio Grande River, in the Territory of New Mexico, and thence running westwardly through the counties of Bernalillo, McKinley and Valencia, in the Territory of New Mexico, and the Counties of Apache, Navajo, Coconino, Yavapai and Mojave in the Territory of Arizona, to the Colorado River, and across the same to its terminus at or near Needles in the County of San Bernardino in the State of California, said entire line from said Isleta Junction to Needles being about five hundred sixty-five and two-tenths (565.2) miles in length, together with all other property described in said deed; and all additions to, betterments of or improvements upon said railroad and other property so conveyed; and

ALSO, every other railroad, telegraph line, extension, branch line and spur track, now owned by the Santa Fe Pacific Company.

INCLUDING also the right of way through the public lands, all grounds used or set apart for station-buildings, workshops, depots, machine shops, side tracks, turn-tables and water stations, and the right, power and authority to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, granted by the United States to the Atlantic and Pacific Railroad Company by Section 2 of the Act of Congress approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and including also the right to such additional grounds for station-buildings,

workshops, depots, machine-shops, side-tracks, turntables and water-stations as from time to time may be found necessary upon the public domain, and as granted by the Act of Congress aforesaid to the Atlantic and Pacific Railroad Company; and also all other ways and rights of way now owned by the Santa Fe Pacific Company for the purposes of or appurtenant to any railroad or telegraph line, extension, branch line or spur track now owned by the Santa Fe Pacific Company; and

INCLUDING also all side tracks and passing tracks, station buildings, office buildings, depots, work shops, machine shops, engine houses, warehouses, water tanks, water stations, turn-tables, section houses, viaducts, bridges and other buildings and structures of every character, all reservoirs, dams, springs, wells, pipe lines, and all other appurtenances whatsoever and wheresoever they may be situated (including the lands used therefor or set apart for the use thereof), now owned by the Santa Fe Pacific Company, pertaining to the use, operation or maintenance of any of said railroads, telegraph lines, extensions, branches or spur tracks now so owned; all engines, tenders, cars and other rolling stock and equipment, and all tools, machinery, rails, spikes, materials, supplies and other chattels now owned by the Santa Fe Pacific Company; all leases or leasehold rights of or in any railroad, telegraph line or appurtenances, and all contracts and contract rights, easements, privileges and other rights in any manner relating or pertaining to the use, operation or maintenance of any railroad, telegraph line or appurtenances, now leased or operated by the Santa Fe Pacific Company, including all the leasehold estate rights, powers, and interests of the Santa Fe Pacific Company as assignee of The Atchison, Topeka and Santa Fe Railway Company in respect to a certain line of railroad extending from Mojave to Bakersfield, in the State of California, under or by virtue of certain indenture of lease and contract

dated January 16, 1899, between the Southern Pacific Railroad Company, the Southern Pacific Company, and The Atchison, Topeka and Santa Fe Railway Company, and all the leasehold estate, rights, powers, and interests of the Santa Fe Pacific Company as assignee of The Atchison, Topeka and Santa Fe Railway Company in respect to a certain line of railroad therein described as the "Mojave Division" under or by virtue of an indenture of lease and contract dated July 15, 1898, between the Southern Pacific Railroad Company, the New Mexico and Arizona Railroad Company, the Sonora Railroad Company, Limited, The Atchison, Topeka and Santa Fe Railway Company, and the Southern Pacific Company; all books, books of record, books of account, papers, maps, and other documents; all office furnture and fittings in any manner relating or pertaining to any of the railroads and appurtenances or to the use, operation, or maintenance thereof; and all other property, real, personal, or mixed, of every description whatsoever of the Santa Fe Pacific Company, and all rights, powers, privileges, grants, and franchises of the Santa Fe Pacific Company.

SUBJECT NEVERTHELESS to the said mortgage dated July 15th, 1897, executed by the Santa Fe Pacific Company to said Union Trust Company of New York as trustee, hereinbefore mentioned; and subject also to all duties, obligations, conditions and restrictions relating to the railroad and property hereby sold which now are binding upon said Santa Fe Pacific Company, as fully as though such sale had not been made.

TO HAVE AND TO HOLD the said railroad and other property, with the appurtenances thereunto belonging unto the Atchison Company, its successor, or successors, and assigns forever.

IN WITNESS WHEREOF, on the day and year first above written the Santa Fe Pacific Company, party of the first part, has caused this indenture to be signed by its Presi-

dent and its corporate seal to be hereunto affixed and the same to be attested by its Secretary.

SANTA FE PACIFIC RAILROAD COMPANY,

(Sgd) By E. P. RIPLEY,
Its President.

[SEAL]

Attest:

(Sgd) L. C. DEMING,
Secretary.

STATE OF ILLINOIS,)
) ss.
COUNTY OF COOK.)

Be it remembered that on this 10th day of August, A. D. 1903, before me, Edward J. Engel, a Notary Public for the State and County aforesaid, duly commissioned, personally appeared Edward P. Ripley, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as President of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument, and known to me to be such President, and as such President acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said Edward P. Ripley, being by me duly sworn, did depose and say that he is the President of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

(Sgd) EDWARD J. ENGEL,
Notary Public.

My Commission expires April 17, 1905. [SEAL]

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.
BOROUGH OF MANHATTAN)

Be it remembered that on this 17th day of August, A. D. 1903, before me, D. J. Sheehan, a Notary Public for the State and County aforesaid, duly commissioner, personally appeared L. C. Deming, to me personally known and known to me to be the person whose name is subscribed to the foregoing instrument as Secretary of the Santa Fe Pacific Railroad Company, the corporation that executed the within instrument and known to me to be such Secretary, and as such Secretary acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation, and that he voluntarily executed the same for the purpose and consideration therein expressed; and the said L. C. Deming, being by me duly sworn, did depose and say that he is the Secretary of the Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

(Sgd) D. J. SHEEHAN,
Notary Public.

[SEAL]

My Commission expires Mar. 30th, 1904.

APPENDIX K

THIS INDENTURE, Made this eleventh day of March, 1904, by and between the Santa Fe Pacific Development Company (hereinafter called the Development Company), a corporation created and existing under and by virtue of the laws of the State of California, party of the first part, and the Santa Fe Pacific Railroad Company (hereinafter called the Santa Fe Pacific Company), a corporation created and existing by virtue of an Act of Congress approved March 3, 1897, party of the second part:

Whereas, the party of the second part executed a deed bearing date the thirtieth day of May, 1903, and duly recorded, conveying to the party of the first part the lands, rights and privileges hereinafter described and conveyed, and

Whereas, it has been agreed between the parties hereto that the party of the first part shall convey to the party of the second part all of the right, title and interest acquired by the party of the first part in and to said lands, rights and privileges as conveyed to it by said deed;

Now, Therefore, this indenture witnesseth, that for and in consideration of the sum of one dollar, to it duly paid by the said Santa Fe Pacific Company, at or before the ensealing and delivery of these presents, and of other valuable considerations, the receipt whereof is hereby acknowledged, the Development Company has granted, bargained, sold, assigned, released, conveyed, confirmed and set over, and by these presents does hereby grant, bargain, sell, assign, release, convey, confirm and set over to the Santa Fe Pacific Railroad Company, its successors and assigns forever, all the right, title, interest, claim and demand which were conveyed by the Santa Fe Pacific Railroad Company by its deed dated May 30th, 1903, to the Santa Fe Pacific Development Company, in and to all lands and all rights which were granted to the

Atlantic & Pacific Railroad Company under and by virtue of Section 3 of an Act of Congress approved July 27, 1866, including all lands for which patents have been granted or for which patents might thereafter be granted, whether such lands had been selected or surveyed or might thereafter be selected or surveyed, and whether such lands were located within the limits specifically designated in said Section 3 of said Act of Congress approved July 27, 1866, or were lands selected in lieu thereof not more than ten miles beyond said limits, and including all lands which the Santa Fe Pacific Company was or might be entitled to receive by way of indemnity in lieu of lands within its place or indemnity limits.

To Have and to Hold the said lands and land-grants and all other property, real, personal and mixed, rights, assets and appurtenances hereby conveyed or assigned, or intended to be conveyed or assigned, unto the Santa Fe Pacific Company, its successor, or successors and assigns, forever.

And the Development Company further covenants that from time to time upon the request of the Santa Fe Pacific Company it (the Development Company) will make, do, execute, acknowledge and deliver all such further acts, deeds and assurances in law as may be reasonably required for effectuating the intention of these premises, and for the better assuring and confirming unto the Santa Fe Pacific Company, its successors and assigns, all and singular the premises, property, and rights hereby conveyed or assigned, or intended so to be.

And the said Development Company does hereby surrender up and relinquish its appointment as attorney in fact of the Santa Fe Pacific Company as in said indenture of May 30, 1903, provided or set forth, and does hereby release the Santa Fe Pacific Company from its appointment of the Development Company, its successors and assigns, as attorney in fact of the Santa Fe Pacific

Company, in said indenture of May 30, 1903, provided and set forth.

In witness whereof, on the day and year first above written, the Development Company has caused this indenture to be signed by its Vice-President, and its corporate seal to be hereunto affixed and the same to be attested by its Assistant Secretary.

SANTA FE PACIFIC DEVELOPMENT COMPANY,

[SEAL]

Approved as to form By .....
Vice President.

Attest:

(Signed) G. Holterhoff, Jr.,
Assistant Secretary.

STATE OF CALIFORNIA,

ss.

COUNTY OF LOS ANGELES.

Be it remembered that on this eleventh day of March, A.D. 1904, before me, a Notary Public in and for the State and County aforesaid, duly commissioned, personally appeared Howel Jones, to me personally known, and known to me to be the person whose name is subscribed to the foregoing instrument as Vice President of the Santa Fe Pacific Development Company, the corporation that executed the within instrument, and known to me to be such Vice President; and also on the day and year last above written personally appeared G. Holterhoff, Jr., to me personally known, and known to me to be the person whose name is subscribed to the foregoing instrument as Assistant Secretary of the Santa Fe Pacific Development Company, the aforesaid corporation that executed the within instrument, and known to me to be such Assistant Secretary; and the aforesaid Howel Jones, as such Vice President, and the aforesaid G. Holterhoff, Jr., as such Assistant Secretary, each acknowledged the execution of said instrument by said corporation as the free act and deed of said corporation and that they each voluntarily executed the same for the purpose and consideration therein expressed.

And the said Howel Jones, being by me duly sworn, did depose and say that he is the Vice President of the Santa Fe Pacific Development Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said G. Holterhoff, Jr., being by me duly sworn, did depose and say that he is the Assistant Secretary of the Santa Fe Pacific Development Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that

the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

Witness my hand and official seal the day and year last above written.

[SEAL] .....

Notary Public.

My Commission expires January 30, 1907

A true copy of the original deed filed in my office.

/s/ E. S. Copeland,
Assistant Secretary.

July 2nd, 1907.

Office - Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1698

RANSOM THEODORE SPURLOCK, et al.,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY and
KERR-McGEE CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

PHILIP E. von AMMON*
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Counsel for Respondents

* Counsel of Record

May 28, 1985

BEST AVAILABLE COPY

IN THE
SUPREME COURT OF THE UNITED STATES
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SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari presents no issue warranting review by this Court. First, the Spurlocks' claim that title to the land grant lands was in an affiliate of Santa Fe Pacific, rather than Santa Fe Pacific, is irrelevant to their claim to the reserved minerals. Further, the Spurlocks lack standing to make this claim, and their claim has no merit. Second, the Spurlocks' argument that federal law, not state law, controls the interpretation of the mineral reservation was not presented to the state courts and cannot be reviewed by this Court. In any event, the issue is one of state law which this Court need not review. Third, the Spurlocks' claim that their due process rights were violated was not timely raised in the Arizona courts and has no legal basis.

INTRODUCTION

In their effort to cast this litigation in a form that will engage the attention of this Court, Petitioners have characterized a private dispute over title to minerals as a cause of grave public significance. The contrary is true.

As litigated in the state courts, this case consisted of a series of claims and counterclaims seeking to quiet title under Arizona law to certain minerals located upon or under land owned by the Spurlocks subject to a mineral reservation in favor of Santa Fe Pacific. The Spurlocks also asserted state law claims seeking to recover damages for the removal of helium-bearing gas from lands subject to the mineral reservation. The case involves claims based on Arizona property and tort law.

In the Petition, the Spurlocks

argue that Santa Fe Pacific's mineral reservation is void under federal law. This claim is peripheral to the real dispute litigated below. Indeed, the Spurlocks have characterized their claims in the consolidated cases as follows:

> Simply stated, the Spurlock v. Santa Fe lawsuit involves the ownership of the helium which lies beneath the plaintiffs' land and whether or not the defendants should respond in damages to the plaintiffs for their past and continuing wrongs. The fact that defendant Santa Fe Pacific Railroad Company is federally chartered and, along with other defendants, has violated its federal charter in many regards, is only collateral and incidental to the main controversy.

Spurlocks' Motion for Remand and Response in Opposition to Petition for Removal, Appendix A at 9 (emphasis added).

The Spurlocks are dissatisfied with the decision reached by the Arizona Court of Appeals. However, the Supreme

Court of the United States is not merely a haven for dissatisfied litigants. Rather, as stated by Chief Justice Taft, "[t]he Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit." Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess. § 33 at 2 (1922). The case below raises no significant constitutional issues and no federal law questions of any public importance.

Reasons for Denying the Petition.

In the Petition, the Spurlocks advance three reasons why this Court should grant a writ of certiorari and review this case. First, they argue that at the time of the conveyances from Santa

Fe Pacific to the Spurlocks' predecessors in interest, the title to the lands involved in this lawsuit was in Santa Fe Pacific's parent company, the Atchison, Topeka and Santa Fe Railway Company ("AT&SF"), and not Santa Fe Pacific. They do not suggest any reason why such a conclusion would entitle them to relief from this Court. Second, they argue that the holding of the Arizona Court of Appeals, that under Arizona law a reservation of "all oil, gas, coal and minerals whatsoever" is unambiguous and reserves the entire mineral estate, must be overturned as contrary to the decisions of this Court. Third, they argue that the failure of one Arizona Court of Appeals judge to recuse himself violated the Spurlocks' rights under the due process clause.

None of the arguments raised by the Spurlocks presents any issue that

justifies review by this Court. The arguments are without merit and, in some instances, untimely. For these reasons, the Petition should be denied.

1. The Spurlocks' claim that title to the land grant lands was in AT&SF rather than Santa Fe Pacific does not warrant review by this Court.

Based upon a tortuous analysis of 1866, 1871, 1897 and 1902 Acts of Congress, the Spurlocks argue that after 1903 the land grant lands, including the lands involved in this lawsuit, were owned by AT&SF rather than Santa Fe Pacific. The point of the argument is unclear. Even if AT&SF rather than Santa Fe Pacific owned the land grant lands in 1903, the Spurlocks would not own the minerals in dispute. Rather, either AT&SF would own the land and underlying minerals, having conveyed to no one, or the conveyances by Santa Fe Pacific to the Spurlocks'

predecessors subject to a mineral reservation would be in effect conveyances by AT&SF.[1] In either case, the judgment

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[1] If AT&SF rather than Santa Fe Pacific was the owner of the lands after 1903, the Spurlocks are not entitled to judgment because they have not joined AT&SF as a party to this litigation. See McShan v. Sherrill, 283 F.2d 462, 463-64 (9th Cir. 1960).

Further, the Spurlocks cannot claim full fee title against AT&SF by adverse possession because their predecessors entered into possession of the lawsuit lands pursuant to the deeds containing mineral reservations. The Spurlocks entered the lands under the same chain of title. An occupant cannot acquire title by adverse possession greater than that which he intended to claim when entering the property. Holmes v. Johnson, 324 Mass. 450, 86 N.E.2d 924, 926 (1949). Thus, when a party enters property under a deed, the deed limits the scope of his possession and he cannot acquire any greater title than the deed purports to convey. See Gibbs v. Pace, 207 Ark. 199, 179 S.W.2d 690, 692 (1944); Porter v. Wilson, 389 S.W.2d 650, 657-58 (Tex. 1965). This is true even when the occupant enters under a void or invalid deed. See Dick v. Darden, 204 Ala. 400, 85 So. 369 (1920). Therefore, because the Spurlocks and their predecessors entered under a deed that contained a mineral reservation, the title they could acquire

(footnote continued)

entered by the Arizona Court of Appeals would be correct.

Recognizing the necessity of presenting an issue of public importance, Petitioners argue that the decision of the Arizona Court of Appeals will affect title to some 4,000,000 acres of land in Arizona and New Mexico, a part of which is within the boundaries of Grand Canyon National Park and Lake Mead National Recreation Area. Petition at 10 n.14. The argument does not withstand the most superficial scrutiny.

If, as Petitioners insist, title to these lands passed to AT&SF in 1903, the occupants, both public and private, may be mere squatters whose rights can only be confirmed by a multitude of

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(footnote continued from previous page)
by adverse possession would be subject to that mineral reservation.

individual quiet-title actions. No overriding national purpose could be served by such a result. It is less than clear how the Interior Department's effort to eliminate pockets of private ownership in the national parks will be facilitated by an adjudication that AT&SF, rather than Santa Fe Pacific, is the owner.

The Spurlocks are, in effect, seeking an advisory opinion from this Court as to whether title to the land grant lands from 1903 onward rested in Santa Fe Pacific or AT&SF. Since the answer to that question is irrelevant to any dispute between the Spurlocks and Santa Fe Pacific or Kerr-McGee, there is no basis for this Court to decide the issue.

Further, the Spurlocks lack standing to argue that AT&SF rather than Santa Fe Pacific owns the land grant lands or

that the Santa Fe Pacific mineral reservation is void. Only the United States or the parties to the 1902 and 1903 transactions would have standing to enforce an obligation of Santa Fe Pacific to convey to AT&SF or to challenge the retention of the land grant lands by Santa Fe Pacific. See Kerfoot v. Farmers & Merchants Bank, 218 U.S. 281 (1910); Illinois Commerce Comm'n v. Central Illinois Public Service Co., 25 Ill. App. 3d 79, 322 N.E.2d 520 (1975); Hazelwood Brewing Co. v. Siebert, 256 Pa. 9, 100 A. 493 (1917). Similarly, the Spurlocks are not entitled to attack the Santa Fe Pacific mineral reservation as contrary to the 1866, 1871, 1897 or 1902 Acts of Congress. The United States Court of Appeals rejected a similar argument in Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1957), observing:

> Even assuming arguendo that appellant's theory is sound

> and that Congress did in 1870 impose a mandatory duty on the Northern Pacific to convey a full fee title to the land here involved, with no reservations, appellant has indicated no authority by which he is enabled to enforce that mandate. Nor has he attempted, if indeed it were possible, to classify himself as a third party beneficiary or a cestui que trust with respect to this land. To overlook such a distinction is to vault the appellant into a status which he has not acquired. In such legal gymnastics we will not indulge.

238 F.2d at 640.

The Spurlocks' claim that title to the lands involved in this lawsuit was in AT&SF is also a collateral attack on the patents issued by the United States to Santa Fe Pacific. A determination of the Secretary of the Interior that a patent should be granted to an applicant cannot be attacked by a third party in a collateral proceeding. Burke v. Southern Pacific R.R. Co., 234 U.S. 669 (1913); see

also Field v. Seabury, 60 U.S. 323 (19 How.) (1856); Boise Cascade Corp. v. Union Pacific R.R. Co., 630 F.2d 720 (10th Cir. 1980), cert. denied, 450 U.S. 995 (1981).

The Spurlocks' reading of the 1866, 1871, 1897 and 1902 Acts of Congress is also erroneous. Santa Fe Pacific was chartered as the successor to the Atlantic and Pacific Railroad Company ("A&P"). It succeeded to a railroad and right of way belonging to that company and certain land grant lands, already patented and not yet patented, granted by Congress. It conveyed the railroad and right of way to AT&SF and retained the land grant lands.[2]

---

[2] Contrary to the Spurlocks' assertions that this transaction was a secret, fraudulent scheme, the transaction was well known at the time. In New Mexico v. Baker, 196 U.S. 432 (1905), the United States Supreme Court recognized that Santa Fe Pacific had conveyed away the railroad pursuant to the 1902 Act of Congress and retained the land grant lands.

Santa Fe Pacific ultimately sold those land grant lands, retaining a severed mineral estate in some of the lands sold. None of this was inconsistent with the four Acts of Congress or with the general intent of Congress in chartering land grant railroads.

Between 1861 and 1871, Congress enacted a series of statutes chartering companies to build railroads to the Pacific coast. The overriding purpose behind those Acts (including the Act of July 26, 1866 chartering A&P) was to establish railroad links with the West. See Platt v. Union Pacific R.R. Co., 99 U.S. 48, 59-60 (1878); Burke v. Southern Pacific R.R. Co., supra. Land grant lands were conveyed to the railroads by the government pursuant to these Acts, not as a gift or bounty, but as compensation and consideration for the railroads'

undertaking to build through the barren and unsettled West. Burke, supra.

The federally chartered railroads received the land grant lands from the federal government and held title to them as any private landowner. Santa Fe Pacific R.R. Co. v. Cord, 14 Ariz. App. 254, 261, 482 P.2d 503, 510, cert. denied, 404 U.S. 912 (1971). As part of their full fee ownership of the land grant lands, the federally chartered railroads had an unrestricted right to dispose of the land grant lands. Platt v. Union Pacific R.R. Co., supra; H.A. & L.D. Holland Co. v. Northern Pacific Ry., 214 F. 920, 923 (9th Cir. 1914). This right of disposition included the right to sell the lands and reserve a severed mineral estate. 1 American Law of Mining § 3.13 at 496 (1983).

Under the terms of the 1897 Act,

Santa Fe Pacific succeeded to the A&P's title to the land grant lands and its power to convey those lands. The purpose of the 1902 Act was not to authorize Santa Fe Pacific to transfer the land grant lands to AT&SF (since Santa Fe Pacific already had the power to transfer those lands to AT&SF or anyone else), but to authorize a transfer of the railroad and operating properties to AT&SF. Contrary to the Spurlocks' lengthy analysis, nothing in the 1902 Act (or any other Act of Congress) required Santa Fe Pacific to convey the land grant lands to AT&SF.

It was fully within the legal rights and corporate powers of Santa Fe Pacific to do what it did: convey the railroad to AT&SF and retain the land grant lands. It was equally proper for Santa Fe Pacific, more than forty years later, to convey some of the land grant

lands to the Spurlocks' predecessors subject to a reservation of "all oil, gas, coal and minerals whatsoever." See Russell v. Texas Co., supra at 641. The Spurlocks have no claim under federal law to the minerals in dispute in this litigation based on an assertion that title to the land grant lands was in AT&SF.

2. The Spurlocks' claim that the mineral reservation is ambiguous under the decisions of this Court was not raised below and is without merit.

The Spurlocks have never before argued that the term "minerals" must be found to be ambiguous under the decisions of this Court. The interpretation of the reservation clause was treated by the parties, and decided by the Arizona courts, as a question of state law.

Having failed to argue the existence of a federal question before the Arizona courts, the Spurlocks may not

assert it as a basis for certiorari. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-97 (1981) (emphasis added). See also New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897).

Whether timely raised or not, there is, in reality, no federal question inherent in this case. The question of whether the language in a private deed is ambiguous is a question of state law. It is not the burden of this Court to rectify perceived inequities in the application of state law by state courts.

The Spurlocks cite four cases in

which, it is claimed, this Court found the term "minerals" to be per se ambiguous. In each case this Court performed its familiar role of interpreting an act of Congress which unquestionably governed the conveyance in issue, a different role altogether from serving as a final arbiter of state law issues.[3]

There is no case in which this Court has undertaken to establish a "federal rule" of construction of private

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[3] Thus, in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), this Court construed the federal government's mineral reservation expressly mandated by the Stock-Raising Homestead Act of 1916. In Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526 (1903), this Court construed an 1864 act of Congress chartering the Northern Pacific Railroad Company. In Watt v. Alaska, 451 U.S. 259 (1981), this Court construed the language of the Wildlife Refuge Revenue Sharing Act of 1935 and the Mineral Leasing Act of 1920. In United States v. Northern Pacific Ry. Co., 311 U.S. 317 (1940), this Court construed language from the same act construed in Soderberg.

conveyances not governed by an act of Congress.

3. The Spurlocks' claim that their due process rights have been violated was not timely raised below and is without merit.

The Spurlocks argue that one of the members of the Arizona Court of Appeals was required to recuse himself and that his failure to do so violated their right to due process of law.

The Spurlocks did not raise that issue in the court of appeals or in their petition for review to the Arizona Supreme Court.[4] Only in their motions filed after their petition for review was denied and mandate issued did the Spurlocks attempt to raise any issue that their right to due

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[4] It is undisputed that the Spurlocks were aware of the asserted grounds for recusal prior to the consideration of this case by the court of appeals. Petition at 28.

process of law was abridged by Judge Haire's decision not to recuse himself.

The Spurlocks did not raise their due process claim in a timely fashion. In Herndon v. Georgia, 295 U.S. 441 (1935), the petitioners asked this Court to decide a federal question that was first raised in a motion for rehearing to the state supreme court. This Court stated that "[t]he long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." Id. at 443. See also Hanson v. Denckla, 357 U.S. 235, 243-44 (1957); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945); American Surety Co. v. Baldwin, 287 U.S. 156, 162-64 (1932).

In the instant case, the Arizona Supreme Court denied the Spurlocks leave

to file motions for reconsideration. In no way can the Arizona Supreme Court be said to have considered and decided the Spurlocks' claim of due process violations.

Even if the Spurlocks had timely raised their due process claim, granting certiorari would be inappropriate. Their argument is utterly devoid of merit.

The question posed by the Petition is whether the due process clause is violated when one member of a three-judge state appellate panel participates in a decision twenty-five years after he served as counsel for the receiver of a company that had done business with one of the parties to the litigation.[5] The answer is

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[5] Judge Haire concluded that he had no knowledge of significant evidentiary facts. Before making his decision not to recuse himself, he consulted with other court of appeals judges, including the chief judge. Appendix B at 35.

(footnote continued)

clearly no. As this Court has observed:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would generally be matters merely of legislative discretion.

Tumey v. State of Ohio, 273 U.S. 510, 523 (1927).

Not one of the cases cited by the Spurlocks suggests that due process is violated when a judge who arguably knows facts that may be of minimal evidentiary value sits as one of three judges on an

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(footnote continued from previous page)

Indeed, the Spurlocks in their letters to Judge Haire disavowed any concern that Judge Haire would be biased and expressly stated that the Spurlocks were not requesting recusal. "By writing this letter and calling certain matters to your attention, I am not suggesting that you would be biased for or against either party. . . ." Appendix C at 36. "The purpose of discussing the foregoing is not to encourage you to recuse yourself." Appendix D at 45.

appellate panel in a civil case. Recusal was fully considered by Judge Haire prior to oral argument in the court of appeals. He concluded correctly that there was no basis for recusal.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari.

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SANTA FE PACIFIC RAILROAD COMPANY

Parent

Santa Fe Southern Pacific Corporation

Affiliates

Santa Fe Industries, Inc.
Advertising Direction, Inc.
Alameda Belt Line
The Atchison, Topeka and Santa Fe Railway Company
Central California Traction Company
The Clinton and Oklahoma Western Railroad Company
The Dodge City and Cimarron Valley Railway Company
Fresno Interurban Railway Company
The Garden City, Gulf and Northern Railroad Company
The Gulf and Inter-State Railway Company of Texas
Haystack Mountain Development Company
The Kansas Southwestern Railway Company
Los Angeles Junction Railway Company
The Oakland Terminal Railway
Oklahoma City Junction Railway Company
Rio Grande, El Paso and Santa Fe Railway Company
St. Joseph Terminal Railroad Company
Santa Fe Forwarding Company
Santa Fe Industrial Realty Company
Santa Fe Rail Equipment Company
Santa Fe Terminal Services, Inc.
Santa Fe Transportation Company
Star Lake Railroad Company
Sunset Railway Company
Transit Ice Company
Kirby Forest Industries, Inc.
Walker-Kurth Lumber Company
Limited Partnership Management, Inc.

Robert E. McKee, Inc.
B & C General Agency, Inc.
McKee Building Services, Inc.
McKee Products, Inc.
Sun Country Construction Company
SF Minerals Corporation
Cerrillos Land Company
SF Coal Corporation
Santa Fe Mining, Inc.
Gallo Wash Coal Company
Hospah Coal Company
Pintada Coal Company
Santa Fe Capital, Inc.
Santa Fe Land Improvement Company
Chula Vista Bayfront Investment Company
Santa Fe Towers Land Company
Santa Fe Natural Resources, Inc.
Santa Fe Energy Company
SF Energy Company of Colombia
SF Energy Company of Indonesia
SF Energy Company of Indonesia
(Banyu Block)
SF Energy Company of Indonesia
(Java Basin A)
Santa Fe Energy Company of Indonesia
(Java Basin B)
Santa Fe Energy Company of Tunisia
Santa Fe Energy Products Company
Santa Fe Oil Company
Santa Fe Pacific Fuels Company
Santa Fe Pipelines, Inc.
Gulf Central Pipeline Company
Gulf Central Storage and Terminal Company
Gulf Central Storage and Terminal Company
of Nebraska
San Diego Pipeline Company
Santa Fe Marketing Company
Santa Fe Pipeline Company
Southwest Pipe Line Company
Standard Office Building Corporation
The Zia Company
Los Alamos Constructors, Inc.

SGSI Corporation
Southern Pacific Company
Bankers Leasing and Financial Corporation
Bankers Leasing Corporation
Asociados Internacionales del Pacifico
BLC Corporation
Commetro Leasing, Inc.
Commonwealth Control, Inc.
The Commonwealth Plan, Inc.
The Commonwealth Plan of Puerto Rico, Inc.
The Commonwealth System, Inc.
Financial Leasing Corporation
Lease Capital, Inc.
The Midwest Commonwealth Plan, Inc.
The Pacific Plan, Inc.
The Worcester Plan, Inc.
BLFC Securities Corporation
ComPlan, Inc.
Bravo Oil Company
Constellation 130, Inc.
Constellation Reinsurance Company
Constellation Reinsco, Inc.
CRM Associates, Inc.
Galaxy Reinsurance Company
One Market Street Properties, Inc.
Pacific Petroleum Pipe Lines, Inc.
San Diego Pipeline Company
Santa Fe Pacific Realty Corporation
Santa Fe Pacific Timber Company
So Pac Finance N.V.
Southern Pacific Development Company
Canton Street Properties, Inc.
Golden Empire Investment Corporation
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Geoproducts Corporation
Southern Pacific Pipe Lines, Inc.
Black Mesa Pipeline, Inc.
Mescalero Pipeline, Inc.
SPPLITT, Ltd.
Southern Pacific Transportation Company

Central California Traction Company
Evergreen Leasing Corporation
Holton Inter-Urban Railway Company
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Petaluma and Santa Rosa Railroad Company
The Ogden Union Railway and Depot Company
Pacific Fruit Express Company
Pacific Motor Transport Company
Pacific Motor Trucking Company
Louis Heller, Incorporated
Portland Terminal Railroad Company
Portland Traction Company
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
Southern Pacific Marine Transport, Inc.
Southern Pacific Warehouse Company
St. Louis Southwestern Railway Company
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Dallas Terminal Railway and Union Depot Company
Glascar, Inc.
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
The Southwestern Town Lot Corporation
Terminal Railroad Association of St. Louis
Sunset Railway Company
Visalia Electric Railroad Company
Sunset Communications Company
Sunset Insurance Company
TOPS On-Line Services, Inc.

KERR McGEE CORPORATION

Subsidiaries

Basic Management, Inc.
Bikita Minerals Private Limited
Crescent Petroleum Company
Downtown Airpark, Inc.
Kerr-McGee Oil (U.K.) Limited
Little Medicine Development Company
San-Ann Service, Inc.
Sunningdale Oil (Ireland) Limited
Texoma Pipe Line Company
Transocean Drilling Company Limited
Transocean Drilling Company (U.K.) Limited
Transocean Drilling (Curacao) N.V.
Transshore Drilling (Curacao) N.V.
Transshore Drilling Company Limited
Transworld Drilling Company (Nigiria) Limited
White Shoal Pipeline Corporation

Partnership

Brewster Phosphates

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1698 (4)

RANSOM THEODORE SPURLOCK, et al.,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY and
KERR-McGEE CORPORATION,
Respondents.

APPENDICES TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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APPENDIX A

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

NO. CIV 80-601 PCT/VAC

RANSOM THEODORE SPURLOCK, VERNIE MARIA SPURLOCK, CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK,

Plaintiffs,

v.

SANTA FE PACIFIC RAIL ROAD COMPANY and KERR-McGEE CORPORATION,

Defendants.

MOTION FOR REMAND AND RESPONSE IN OPPOSITION TO PETITION FOR REMOVAL

(Oral Argument Requested)

COME NOW the plaintiffs, by and through their attorney, Jack E. Evans, and

respectfully file this, their Motion for Remand and Response in Opposition to Petition for Removal, and urge this Court to remand this matter to the Superior Court of Arizona in and for the County of Apache pursuant to 28 USC §1447(c). This Motion for Remand and Response in Opposition to Petition for Removal is supported by the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 28th day of July, 1980.

JACK E. EVANS, LTD.

By_____

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

This lawsuit was commenced on April 30, 1973, by the plaintiffs filing a Complaint in the Apache County Superior Court. A copy of this Complaint is attached hereto marked Exhibit A and by this reference incorporated herein. This Complaint sought relief against Santa Fe Pacific Railroad Company, a Kansas corporation, and Kerr-McGee Corporation, a Delaware corporation. The relief requested was in three counts. First, the Spurlocks sought to quiet title to the helium located underneath their ranch located in Apache County, Arizona. Second, the plaintiffs sought to recover damages on account of the defendants' past and continuing conversion of the helium. Third, the plaintiffs sought to recover damages on account of the loss of

speculative value to the lawsuit land on account of the defendants' exploration. On May 17, 1973, Santa Fe answered the Complaint admitting that it was a Kansas corporation doing business in Arizona. Thereafter, Santa Fe filed an Amended Answer alleging that it was not a Kansas corporation but was, instead, a corporation duly incorporated by Act of Congress approved March 3, 1897. Since both the plaintiffs and the defendant had erroneously characterized Santa Fe as a Kansas corporation, rather than a federally chartered corporation, the plaintiffs filed an Amended Complaint to correct this error.

After some initial discovery was concluded, the plaintiffs filed their Third Amended Complaint on February 28, 1975. A copy of this Third Amended Complaint is attached hereto marked

Exhibit B and by this reference incorporated herein.

As the Court can see from a review of the Third Amended Complaint, it adds several new theories of recovery, although the lawsuit remained basically one seeking to quiet title to the helium and to recover damages on account of the defendants' past and continuing injury to the plaintiffs. More specifically, Count Two of the Third Amended Complaint remained an action seeking to recover damages on account of the defendants' conversion. Additional allegations, however, were added to Count Two. These additional allegations specifically stated that Santa Fe was a corporation organized by a special Act of Congress of the United States, a copy of which was attached to the Third Amended Complaint, and had succeeded to the rights, powers and

purposes of the Atlantic and Pacific Railroad Company, which corporation was formed pursuant to an 1866 Act of Congress of the United States, a copy of which Act was also attached as an exhibit to the Third Amended Complaint. These additional allegations contained in Count Two of the Third Amended Complaint went on to state that the defendants knew that the sole power and purpose of the defendant Santa Fe was to construct and operate a railroad and telegraph line, and that said purposes and powers were further limited by the Constitution and laws of the State of Arizona; further, that the defendants knew that Santa Fe was originally given the lands which are the subject matter of the lawsuit by the Congress of the United States to aid in the construction of a railroad across Apache County; further, that the defendants knew that said lands

were only to be sold by Santa Fe with the proceeds therefrom to be applied solely to the construction of said railroad; further, that the defendants knew that the purchasers of the lawsuit land from Santa Fe were to acquire all of Santa Fe's right, title and interest in and to the said lands; further, that Santa Fe represented to the United States of America that said lands were "non-mineral" in order to obtain title thereto and that the United States of America gave the lands to Santa Fe upon the express representation by Santa Fe that the lands did not contain minerals; further, that Santa Fe, pursuant to the 1866 Act of Congress, is only authorized to own lands necessary or proper for the construction of a railroad and for turn-outs, standing places for cars, depots and station houses, and that Santa Fe is expressly without the

authority to speculate in, deal in, lease, hold, enter upon, prospect for, drill for, explore for oil, gas, coal, minerals or other substances or other interests in land, and that the defendant Santa Fe and the other defendants knew that Santa Fe was without the right to assert any right, title, interest or claim in and to the land owned by the Spurlocks and that by doing so the same violated the congressional purpose in granting said lands to Santa Fe and was beyond its corporate power and purposes and that Santa Fe had not complied with the laws of the State of Arizona in that it failed to qualify the corporation to do business in the State of Arizona and had so failed at the time it reserved unto itself or attempted to reserve unto itself the interest in the lawsuit lands. There were further allegations added to the Third Amended Complaint

relating to the payment of taxes and other matters.

Both the defendant Santa Fe and the defendant Kerr-McGee were served with copies of this Third Amended Complaint and responded thereto. Thereafter, additional discovery was had in this Superior Court action and the defendant Santa Fe filed a series of Motions for Partial Summary Judgment. The first such motion was filed on July 26, 1979, a copy of which is attached hereto marked Exhibit C and by this reference incorporated herein, and dealt with the plaintiffs' claim of failure to qualify to do business in Arizona. The second Motion for Partial Summary Judgment was filed on August 9, 1979, a copy of which is attached hereto marked Exhibit D and by this reference incorporated herein, and dealt with the plaintiffs' claim of de facto dissolution

of Santa Fe Pacific. The third Motion for Partial Summary Judgment was filed on August 10, 1979, a copy of which is attached hereto as Exhibit E and by this reference incorporated herein, and specifically dealt with the plaintiffs' claims set forth in paragraph VII of Count II of the Third Amended Complaint relating to the congressional acts under which Santa Fe and its predecessor were chartered. Each of these Motions for Partial Summary Judgment were argued and denied by the Court (see minute entry of Paul G. Rosenblatt, Judge of the Superior Court, dated June 27, 1980).

On August 1, 1979, the plaintiffs filed their Motion to File Fourth Amended Complaint and to Add Additional Party Defendants, a copy of which is attached hereto marked Exhibit F and by this reference incorporated herein. This Motion to

File the Fourth Amended Complaint sought to change three things. First, it sought to delete certain parties from the lawsuit. Second, it sought to join as an additional party defendant Santa Fe Industries, Inc. Third, it sought to increase the prayer for punitive damages from $5 million to $50 million. As is stated in the motion, Santa Fe Industries, Inc. was sought to be brought into the lawsuit because it is the alter ego of Santa Fe Pacific Railroad Company and it received from Santa Fe Pacific Railroad Company, without consideration, over $20 million in cash plus other property which belonged to Santa Fe Pacific Railroad Company. The plaintiffs pointed out in their motion that such a transfer would allow the plaintiffs to sue Santa Fe Industries, Inc. as the recipient of fraudulently conveyed property pursuant to

the Arizona Fraudulent Conveyance Act, A.R.S. §44-1010. After Judge Rosenblatt granted this Motion to Amend, the defendants, Santa Fe Pacific Railroad Company and Kerr-McGee Corporation, were served with copies of the Fourth Amended Complaint. Santa Fe Industries, Inc. has not yet been served.

After more than seven years of discovery and motions, and the filing of thousands of papers into Court, this lawsuit was scheduled for a pretrial conference on July 29, 1980, and for trial, to a jury, in St. Johns, Arizona, on September 15, 1980. On the eve of trial, the defendants, Santa Fe Pacific Railroad Company and Kerr-McGee Corporation, filed a Petition for Removal to the United States District Court for the District of Arizona. This petition is based upon an allegation that this Court

has original jurisdiction under the provisions of 28 USC §1331, in that it is an action arising under the Constitution, laws or treaties of the United States and in an amount in excess of $10,000. The removal petition was improperly filed and this matter should be remanded to the Superior Court.

There are several reasons why this Court should remand this action. First, reference to federal laws in the Fourth Amended Complaint is merely incidental and collateral to the main controversy which centers around a quiet title lawsuit. Second, the removal petition was not timely filed. It should have been filed, if at all, within 30 days after the pleadings containing the alleged basis for removal were served on the defendants. Third, the removal petition was not verified as is required by law.

2. Reference to Federal Laws in the Fourth Amended Complaint is Merely Incidental and Collateral to the Main Controversy

As the Court can see from a review of the pleadings on file in this case, the plaintiffs are seeking to quiet title to the helium which is located underneath their land. The plaintiffs are also seeking damages under various theories, including conversion and loss of speculative value. Under these circumstances, mere reference to federal laws should not invoke federal question jurisdiction and this matter should be immediately remanded. A similar result was reached in Ashley v. Southwestern Bell Tel. Co., 410 F.Supp. 1389 (W.D. Tex. 1976). There, the plaintiffs sued to recover damages arising out of an alleged invasion of privacy. In their lawsuit, the plaintiffs alleged an invasion of their "constitutional,

contractual and inalienable rights of privacy" and that the defendant had been in violation of "the law, State, Federal, and Regulatory, as well as the rules of the Defendants." The Federal District Court remanded the case to state court although reference was made in the pleadings to federal statutes. The court thoroughly reviewed the law on the subject including the leading case of Gully v. First Nat. Bank of Meridian, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936):

> The Supreme Court stated in that opinion that for a suit to be removable 1) a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action; 2) the right or immunity must

be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another; 3) a genuine and present controversy, not merely a possible or conjectural one, must exist as to such right or immunity; 4) the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal; and 5) the complaint must be confined to a statement of plaintiff's cause of action without anticipation of any probable defense. These principles have remained the law of removal

since Gully and have only been elaborated upon in subsequent cases.

Applying the law to the facts, the District Court held that the case should be remanded because the issue of a federal law was merely incidental or collateral to the main controversy:

> Although the court's role is to pierce the veil of plaintiff's complaint, plaintiff is still the master of his own complaint as to what law he will rely upon, The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1912), and absent fraudulent concealment of a federal claim, he has the right to choose by the allegations of

his complaint the removability of his case. Crow v. Wyoming Timber Products Co., 424 F.2d 93, 95 (10th Cir. 1970). Removal is always proper where the real nature of the claim asserted in the complaint is federal, but where plaintiff has a choice of relying on state law and does so rely, there can be no removal except on the basis of diversity. City of Galveston v. Int'l. Organization of Masters, Mates and Pilots, 338 F.Supp. 907, 909 (S.D. Tex. 1972).

Removal Statutes should be given strict construction, because the congressional policy is to limit removal

out of regard for the rightful independence of state governments. See, La Chemise Lacoste v. Alligator Co., Inc., 506 F.2d 339 (3rd Cir. 1974) cert. den. 421 U.S. 937, 95 S.Ct. 1666, 44 L.Ed.2d 94 (1975). Thus, mere reference to the Federal Constitution, laws or treaties are not adequate to disclose a federal question, instead the pleadings must spell out a claim integrated with a Federal statute or the Constitution. Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co., 263 F.Supp. 602 (S.D. Tex. 1967), McCartney v. State of West Virginia, 156 F.2d 739 (4th

Cir. 1946). Also, a federal question merely incidental or collateral to the main controversy is not sufficient to serve as a basis for removal jurisdiction. Armstrong v. Alliance Trust Co., 126 F.2d 164, 167 (5th Cir. 1942).

Simply stated, the Spurlock v. Santa Fe lawsuit involves the ownership of the helium which lies beneath the plaintiffs' land and whether or not the defendants should respond in damages to the plaintiffs for their past and continuing wrongs. The fact that the defendant Santa Fe Pacific Railroad Company is federally chartered and, along with other defendants, has violated its federal charter in many regards, is only collateral and incidental to the main controversy.

Indeed, Santa Fe Pacific Railroad Company, being a federally chartered corporation, is deemed to be a citizen of every state for the purposes of diversity jurisdiction. To take this case away from the state court because Santa Fe Pacific Railroad Company is federally chartered and has violated the laws creating it, would be an extreme case of the "tail wagging the dog."

3. The Petition for Removal Was Not Timely Filed and This Case Should Be Immediately Remanded to the Superior Court of Arizona

Santa Fe and Kerr-McGee cannot just remove this complicated lawsuit to federal court any time they wish. Because this lawsuit is currently based upon an amended pleading, Santa Fe and Kerr-McGee may only remove within 30 days after they were served with the amended pleading containing the alleged basis for federal

jurisdiction. 28 USC §1446(b) provides, in pertinent part, that:

> if the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

As was pointed out above, the allegations concerning violation of Santa Fe's charter and the laws creating the federal corporation were alleged in the Third Amended Complaint which was filed in the Superior Court of Apache County,

Arizona, on February 28, 1975. (See pages 7 and 8 of Third Amended Complaint attached hereto as Exhibit B.) A comparison of this allegation contained in Count Two of the Third Amended Complaint to the same allegation contained in Count Two of the Fourth Amended Complaint reveals that the words "and affiliated defendant" were added to the Fourth Amended Complaint nine times. No other changes were made in this allegation from the Third Amended Complaint to the Fourth Amended Complaint. If Santa Fe and Kerr-McGee wanted to remove this case to federal court, they should have done so within 30 days of being served with the Third Amended Complaint over five years ago. The effect of a late petition for removal is discussed in 14 Wright & Miller, Federal Practice and Procedure §3732, at 727-730 (1976):

The statute specified that this supplementary period for petitioning for removal is available only when "it may be first ascertained that the case [not previously removable] is one which has become removable." Thus an amendment of the complaint will not revive the period for removal if the case previously was removable but defendant failed to exercise his right to do so. A different result is reached, however, if the amendment provides a new basis for removal or changes the character of the litigation so as to make it substantially a new suit, since a willingness to remain in a state court to

litigate a particular claim should not be interpreted as a willingness to remain in a state court to adjudicate a different claim.

These principles are illustrated in Adams v. Western Steel Buildings, Inc. In that case, defendants filed a third-party complaint against federal agents for breach of warranty. The agents arguably could have removed this claim under Section 1442(a)(1) of Title 28, but they failed to do so. Seven months after filing their original third-party complaint, defendants filed an amended third-party complaint alleging negligence. Sixteen

days later the agents filed a petition for removal. In granting the motion to remand Chief Judge Arraj noted that "the mere fact of some alteration in the claims stated is insufficient to support new attempts at removal. If the action could have been removed initially but was not, an amendment of the claim does not generally revive the right of removal." He conceded that "a sufficiently substantial change in the nature of the action may reafford the opportunity" to remove; "the question is whether the alteration has 'so changed the character of the litigation as to make it substantially a new

suit begun that day.'"

* * * *

> The time limitations in Section 1446 are mandatory and must be strictly construed in accordance with the computation principles in Federal Rule of Civil Procedure 6. They will not be extended by continuances, demurrers, motions to set aside service of process, pleas in abatement, stipulations, or court orders,...

The Petition for Removal is five years too late. This matter is set for a pretrial conference on July 29, 1980. The trial of this matter which will undoubtedly last for weeks has been scheduled, for the convenience of all the parties, witnesses and the Court, for September 15,

1980. No further delay should be caused by the defendants' improper removal. This case should immediately be remanded to state court.

4. The Petition for Removal Was Not Verified As Is Required by Law

28 USC §1446(a) requires a petition for removal to be verified. Although the lack of verification of a removal petition is not fatal, it should be cured within a reasonable period of time. Nelson v. Peter Kiewit Sons' Co., 130 F.Supp. 59 (D.N.J. 1955). Such an amendment should be filed within the 30-day period for seeking removal. Cf. Luehrs v. Utah Home Fire Insurance Co., 450 F.2d 452 (9th Cir. 1971). Given the improper and erroneous circumstances alleged in the Petition for Removal, however, the defendants Santa Fe and Kerr-McGee in this particular case may not dare to file an

affidavit with their removal petition.

5. The Plaintiffs are Entitled to Their Costs Incurred in Bringing This Motion for Remand, Including Reasonable Attorneys' Fees

The Petition for Removal which has been filed by Santa Fe and Kerr-McGee is poorly taken. This case must be remanded to the Superior Court and the Spurlocks are entitled to an order assessing Santa Fe and Kerr-McGee and their surety on the removal bond, Aetna Casualty and Surety Company, for "all costs and disbursements incurred by reason of the removal proceeding."

Such "costs and disbursements" would include the attorneys' fees necessitated by this Petition for Removal. Eaddy v. Little, 234 F.Supp. 377, 380 (E.D. S.C. 1974) ("Terms and conditions are not limited to taxable costs but may include compensation for all the expenses to which

the defendant has been put including attorneys' fees...") See also the discussion in 14 Wright and Miller, Federal Practice and Procedure §3739, at 764-765.

6. Conclusion

Based upon the foregoing, it is respectfully submitted that this Court forthwith remand this case to the Superior Court of Arizona in and for the County of Apache.

Respectfully submitted this 28th day of July, 1980.

JACK E. EVANS, LTD.

By /s/
Jack E. Evans
1000 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012
Attorneys for Plaintiffs
Spurlock

Copy of the foregoing hand
delivered this 28th day of
July, 1980, to:

Silas H. Shultz, Esq.
Donald R. Gilbert, Esq.
Timothy Berg, Esq.
Fennemore, Craig, von Ammon & Udall, P.C.
100 West Washington
1700 First National Bank Plaza
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Attorneys for Defendant Santa Fe Pacific
Railroad Co.

Earl H. Carroll, Esq.
James G. Speer, Esq.
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for Defendant Kerr-McGee
Corporation

/s/_____

Copy of the foregoing mailed
this 28th day of July, 1980, to:

The Honorable Paul G. Rosenblatt
Yavapai County Superior Court
Prescott, Arizona 86301

John T. Crosby, Clerk
Apache County Superior Court
St. Johns, Arizona 85936

/s/_____

APPENDIX B

March 13, 1984

Jack E. Evans, Esq.
Jack E. Evans, Ltd.
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Philip E. von Ammon, Esq.
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Phoenix, AZ 85004

Re: 1 CA-CIV 6938, Spurlock, et al. v. Santa Fe Pacific Railroad and Kerr-McGee Corporation

Gentlemen:

This letter is in response to Mr. Evans' letters of February 29, 1984 and March 4, 1984, Mr. von Ammon's letter of March 2, 1984, and Mr. Palmer's letter of March 2, 1984. First, let me state that I appreciate having this matter called to my attention. In my opinion Mr. Evans would not have fulfilled his obligations and duties to this court had he not forthrightly and promptly called this matter to my attention at this early stage in the appeal proceedings. When Chief Judge

Jacobson assigned me to the panel which was to consider and dispose of this appeal, I did remember that during the early 1960's I had represented the receiver for Apache Oil and Helium Corporation, and that the primary assets of the corporation were net profit interests derived from leases relating to helium. Prior to receiving Mr. Evans' letter of February 29, 1984, I did not recall any instance in which I was required to render an opinion, or even to consider, the meaning of the granting clauses of any helium leases involved in the receivership proceedings. Additionally, I did not recall any instance in which the receiver and any of the parties to the pending appeal might have been actively involved in an adversarial confrontation. The name "Spurlock" did ring a bell, and I assumed that I might have seen the name in some of the documentation involved in the receivership proceedings.

After receiving Mr. Evans' letters, I have given the matter considerable additional thought. I have spent several hours reviewing all of the records retained by Evans, Kitchel & Jenckes relating to my representation during the 1960-63 period. These records do not reveal any instance of the receiver, or myself as the attorney for the receiver, being involved in any questions relating in any way to the interpretation of the granting clauses of the leases which formed the basis for the retained net profit interests of Apache Oil and Helium Corporation.

It must be kept in mind that the receiver of Apache Oil and Helium

Corporation functioned primarily as a "caretaker" attempting to sort out the various stockholder conflicts relating to Apache Oil and Helium Corporation. The receivership terminated when the various stockholder groups were able to work out a settlement of their interests.

Insofar as concerns the federal court litigation referred to in Mr. Evans' letters, I did not have any independent recollection of that litigation. From a review of the receiver's final report, and from a review of the retained files of Evans, Kitchel & Jenckes, it is evident that during my representation the receiver took no part in that litigation. Therefore, to the best of my knowledge, I have had no occasion to review or even consider the interrogatories or other documentation involved in that litigation. Of course, as attorney for the receiver I did have some contact with Kerr-McGee officials and attorneys relating to the net profits agreement, but these contacts were minimal, and I do not recall any confrontations or other dealings which would suggest that I should disqualify myself because of these contacts.

In summary, initially I had no recollection of any participation in the receivership proceedings which would suggest that I disqualify myself in the pending appeal. My subsequent review of the retained Evans, Kitchel & Jenckes files did not reflect any possibility that I was involved in any representation which would justify disqualification. Additionally, after having reviewed all of the above-mentioned files, I have seen nothing which would serve to "jog" my memory as to

any representation which would suggest disqualification. I have referred counsel's correspondence relating to this matter to the other judges on this panel, Judges Eubank and Meyerson, as well as to Chief Judge Jacobson. Based upon their review of the correspondence, as well as my discussion with them concerning the matters set forth in this letter, they have advised me that they see nothing which would justify or warrant my disqualifying myself for the pending appeal. Accordingly, I have decided that I will continue to participate in the consideration and disposition of the appeal. Again, I appreciate having this matter called to my attention in order that it might be considered and objectively evaluated prior to my having invested the substantial amounts of time which will be required to consider and determine the issues raised in this appeal.

Sincerely yours,

L. Ray Haire

LRH/hm
c: Chief Judge Jacobson
Judge Eubank
Judge Meyerson
Clerk's Office (w/enclosures)

APPENDIX C

February 29, 1984

The Honorable Ray Haire
Arizona Court of Appeals
First Floor, South West Wing
State Capitol
Phoenix, Arizona 85007

RE: Ransom Theodore Spurlock, et ux., et al., v. Santa Fe Pacific Railroad, a corporation; and Kerr-McGee Corporation, a Delaware corporation,
1 CA-CIV 6938

Dear Judge Haire:

The above referenced case was assigned to your department by an order dated February 15, 1984. For the reasons hereinafter stated you may desire to recuse yourself because of your involvement as a practicing lawyer in another case during the early 1960's. By writing this letter and calling certain matters to your attention I am not suggesting that you would be biased for or against either party in this case. However, it is probable that you have forgotten your involvement in the prior case due to the passage of over 20 years. As you become more deeply involved in an analysis of this case it is probable that your prior involvement will be recalled. Assuming that your prior involvement were to be the triggering mechanism for your withdrawal, it obviously serves the interest of the Court and the parties to have your withdrawal occur now rather than later.

To refresh your recollection I will briefly discuss your association with the prior case and how it is related to this case.

On February 17, 1960, the Maricopa County Superior Court entered an order authorizing Marvin Dennis, Receiver for Apache Oil and Helium Corporation, to employ the firm of Evans, Kitchell & Jenckes as the receiver's counsel in David Halliburton, et al., Plaintiffs, v. Apache Oil & Helium Corporation, an Arizona corporation, et al., Defendants, No. 106659. You, as a member of that firm, then entered an appearance as the receiver's attorney. You thereafter continued to represent the receiver for a period of almost three years. On December 7, 1962 the receiver filed his notice of final account. On January 15, 1963 the Court entered an order approving the final account including, inter alia, authorization to pay a final fee to Evans, Kitchell & Jenckes of $3800.00. Attached are copies of the final account and order for your convenience.

The receiver had been appointed to conserve the assets of Apache. The sole asset of Apache was its interest under an agreement with Kerr-McGee Oil Corporation. A copy of that agreement, which was attached to the receiver's final account, is enclosed. The Apache agreement with Kerr-McGee was based upon certain leases on land located near Navajo, Arizona. One of the leases was on the Spurlock family ranch. Apache had acquired the leases pursuant to the terms of a Commitment Agreement with Arizona Gas and Chemical Corporation, a copy of which is attached

to the Answer of H. Marvin Dennis, as Receiver, to Writ of Garnishment, which was signed by you as attorney for the receiver. A copy of the Answer and Commitment Agreement are attached.

In your capacity as attorney for the receiver you became involved in a Federal District Court case entitled D. A. McGee, Kerr-McGee Oil Industries, Inc., a corporation, and Martin T. Bennett, Plaintiffs, v. Apache Oil and Helium Corporation, a corporation, et al., Defendants, No. CIV 3820-Phx. which was an action to foreclose on Apache's only asset, its interest under the agreement with Kerr-McGee. Certain pleadings and exhibits in that case were important exhibits in this case.

Most of the exhibits and documents which were involved in the Apache receivership case were also exhibits in this case. Attached is a partial listing of exhibits, in evidence, in this case which were also involved in the receivership case. Due to the length and extent of your involvement in the Apache case it appears there may have been more exhibits and documents which were common to the two cases.

Without discussing all of the issues in this case it is sufficient to note that the ownership and right to the proceeds from helium on the Spurlock ranch is one of the fundamental issues in this case. The determination of that ownership was based, in part, upon the meaning of the terms, "oil and gas", and "oil and gas and minerals", and similar terms. Extensive evidence of the custom and usage of

those terms was introduced during the trial. A substantial portion of that evidence consisted of documents which were involved in the Apache receivership.

Based upon a preliminary examination of the court records in the Apache receivership case it is possible that you were required to form and render opinions as to the meaning of the foregoing terms and perhaps the ownership of the helium and the right to the proceeds therefrom. Thus, upon reflection, you may conclude that positions and/or opinions which you expressed in your capacity as a practicing attorney are the same opinions you will be called upon to express in this case.

It is obviously difficult to compose a letter wherein recusal is discussed without the contents thereof suggesting that recusal is appropriate. However, I am merely calling to your attention matters which you considered almost a quarter of a century ago which you have probably forgotten. You will probably recall those matters as you delve into this case. Thus, if you believe recusal is appropriate, I am offering you the opportunity to consider the same now as opposed to later.

Very truly yours,

JACK E. EVANS, LTD.

_____

Jack E. Evans

cc: Mr. Philip E. von Ammon
Suite 1700, 100 W. Washington
Phoenix, Arizona 85003

Mr. Robert L. Palmer
2700 N. Third Street,
Phoenix, Arizona 85004

APPENDIX D

March 4, 1984

The Honorable Ray Haire
Arizona Court of Appeals
First Floor, South West Wing
State Capitol
Phoenix, Arizona 85007

Re: Ransom Theodore Spurlock, et ux., et al., v. Santa Fe Pacific Railroad, a corporation; and Kerr-McGee Corporation, a Delaware corporation,
1 CA-CIV 6938

Dear Judge Haire:

My letter to you of February 29, 1984 was intended to accomplish the purpose stated therein, to wit: To assist you in recalling your involvement as a practicing attorney in litigation which occurred over 20 years ago, which litigation included a portion of the Spurlock family ranch and involved a large number of documents which are exhibits in this case. Contrary to Mr. von Ammon's and Mr. Palmer's letters, my letter was not a "transparent attempt at judge shopping", but was an attempt to avoid the inevitable delay which would ensue if, upon discovery of the relevancy of the prior proceedings, you then elected to recuse yourself. It is impossible for Mr. von Ammon, Mr. Palmer, or me to determine the full extent of your involvement in the prior proceedings. Thus, the suggestion of recusal was expressly negated in my letter. I merely discharged the duty which I have to you and the Court which was to inform you of

the matter. It ill behooves counsel to attempt to convert an obvious effort to inform the Court into an unethical and improper act. Assuming that either Mr. von Ammon or Mr. Palmer had been aware of your prior involvement I would have considered it highly improper for them to have failed to act as I acted.

Mr. von Ammon's letter is incorrect in several particulars. I assume those errors arise from the fact that Mr. von Ammon was not involved in the trial of the case and he is therefore unfamiliar with the facts. There is a direct relationship between the legal affairs of Apache and this case. Otherwise, all of the Apache legal documents would have been inadmissible in this case. Some of the more important Apache documents and their significance to this case are:

1. Pltf.Ex. 124: Amendment to Oil and Gas Lease dated August 20, 1956 between Spurlock & Wetzler as lessors and Apache as lessee wherein the Spurlock Oil and Gas Lease, which had been assigned by Apache to Kerr-McGee, was amended to include helium. A copy of that document is enclosed. Apache's, Kerr-McGee's and the Spurlocks' positions were clear, to wit: Oil and gas did not include helium thereby necessitating an amendment of the oil and gas lease to include helium.

2. Pltf. Ex. 113: Letter Agreement between Kerr-McGee and Apache dated August 1, 1956 wherein a distinction is drawn between "oil, gas, and minerals" and helium by using the terms independently and not inclusively. A copy of that document is enclosed.

3. Pltf. Ex. 127: Assignment of Oil and Gas Leases from Apache to Kerr-McGee dated August 22, 1956 wherein Apache expressly warrants that the leases include helium as well as oil and gas, but which assignment was preceded by Apache obtaining amendments to all of the leases to include helium.

4. Pltf. Ex. 87: Commitment Agreement between Apache and Arizona Gas dated May 25, 1955 wherein separate provisions are contained for drilling helium wells on the one hand and gas wells on the other hand.

Mr. von Ammon states that the matters involving Apache were not on land, the title to which is at issue in this case. However, the same was on the Spurlock family ranch and adjacent to the land involved in this lawsuit. Moreover, all of the parties in this lawsuit were involved in the land in which Apache was involved. Thus, Kerr-McGee, Atchison Topeka and Santa Fe, and the Spurlocks were all involved and were parties to the leases on the land in which Apache had an interest. The documents they executed on that land and the language they employed in those documents were powerful and persuasive evidence of their understanding regarding whether the terms "oil and gas" or "oil, gas and minerals" included "helium".

The interrogatories which were filed in D. A. McGee, Kerr-McGee Oil Industries, Inc., et al., vs. Apache Oil and Helium Corporation are dated in 1964. However, it is the answers thereto, not the interrogatories, which became relevant

in this lawsuit. Those answers related to many of the documents which were exhibits while you were representing the receiver.

Mr. von Ammon's characterization of my letter as an attempt to disqualify a judge merely because the judge was involved in a particular area of the law in his private practice is incorrect. I regard you as having outstanding expertise in the real property field and would consider myself fortunate to have your recognized expertise in that field applied to the facts and legal principles of this case. However, my letter was not written because of your prior involvement in the real property field. The helium deposits at Navajo, Arizona are sui generis. Those persons who have dealt with them have regarded them as one of a kind. Thus, it is the particular facts of this case and not your prior involvement in the real property field that prompted me to write you. You have been involved in a legal and factual situation involving helium deposits on the same ranch that is involved in this lawsuit and your involvement extended to many of the same documents and parties that are involved in this lawsuit.

The purpose of discussing the foregoing is not to encourage you to recuse yourself. Instead, the purpose is the same as my original letter, to wit: To inform you of matters which I assume will come to your attention as you devote time and attention to this case. If those matters would cause you to recuse yourself then I trust that Mr. von Ammon and Mr. Palmer would agree with me that you would prefer to recuse yourself now rather than

after you have expended significant time on the case.

Very truly yours,

JACK E. EVANS, LTD.

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Jack E. Evans

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No. 84-1698

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,
v.
SANTA FE PACIFIC RAILROAD COMPANY AND KERR-McGEE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

I. The Claim that the Mineral Reservation Clause Is Void and Unenforceable, Affecting Millions of Acres in the West, Is Plainly Substantial and Warrants Review.

This Court's determination whether a mineral reservation clause in deeds executed by Santa Fe Pacific Railroad Company ("Santa Fe") is void and unenforceable will affect the rights of more than 100,000 owners of over 4,000,000 acres in Arizona and New Mexico. Respondents do not challenge this fact and make not the slightest attempt to reconcile it with their assertion that this case presents "no . . . questions of any public importance." Brief in Opposition (hereinafter "Br. Opp.") at 4. To the contrary, this Court has consistently viewed

as significant just such issues as are posed here involving railroad land grant policies and preservation of a federal statutory framework which continues to affect the use of millions of acres rich in natural resources.

Respondents urge this Court not to correct the mistakes of the appellate court because, according to their theory, righting the wrong will have no effect on the rights of the Spurlocks. Respondents posit two alternatives if the reservation is void, both of which place title to the disputed substances in the Atchison, Topeka and Santa Fe Railway Company ("AT&SF").[1] Br. Opp. at 6-7. This ill-conceived stratagem cannot succeed in shifting the focus from the actual controversy here. This case does not present a controversy between the Spurlocks and AT&SF and no court has decided any question of quieting title as between the Spurlocks and AT&SF. Thus, if the court of appeals' decision is overturned, as it should be, the correct outcome is obvious—the trial court's determination that the reservation is void and unenforceable against the Spurlocks will be reinstated and title to the disputed substances as between Santa Fe and the Spurlocks will be quieted in favor of the Spurlocks. If, as a result of this outcome, AT&SF believes that a question exists as to title between itself and the Spurlocks, it is free to test in the state courts in the first instance any right it believes it may have.[2]

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[1] Respondents argue that under either alternative the judgment of the appellate court is correct. Br. Opp. at 7-8. Even a cursory review of the court of appeals' decision demonstrates that respondents are wrong. Finding the reservation enforceable, the court of appeals directed judgment to be entered placing title to all but the surface of the lands, not in AT&SF, but in Santa Fe.

[2] While a potential controversy between the Spurlocks and AT&SF might conceivably raise issues concerning adverse possession by the Spurlocks as against asserted title by AT&SF, such hypothetical issues are not before this Court in this case. Thus, respondents' cursory discussion (Br. Opp. at 7 n.1) of a potential legal position on adverse possession that AT&SF might take at some future time

Respondents also unsuccessfully attempt to deflect attention from the importance of the issue by asserting that this Court should not resolve the question whether the mineral reservation is void and unenforceable because it might then be difficult and time consuming to confirm the owners' rights with respect to the 4,000,000 acres. Br. Opp. at 8-9. This, however, is no reason for leaving in place an appellate decision which negates the effect and intent of a congressional statutory scheme and which without doubt will have adverse precedential effect in resolving questions concerning title to this acreage.[3]

More importantly, by holding that the mineral reservation is void, this Court will effectively quiet title as between Santa Fe and the owners of the more than 4,000,000 acres. On the other hand, if the court of appeals' decision upholding the mineral reservation is allowed to remain, it will give rise to an untold number of additional lawsuits, especially in view of the "repurchase option" contained in the reservation. The reservation, as upheld by the court of appeals, in effect provides Santa Fe with the option of reacquiring the land for approximately one dollar per acre (the approximate average price per acre originally paid to Santa Fe) if the surface thereof is "necessary and convenient" for use in developing or acquiring any valuable substances on or under the land, currently known or discovered in the future. *See* App.

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is wholly irrelevant to the determination here. Moreover, the appellate court's prior discussion of adverse possession does not affect the outcome, limited as it was to a question of adverse possession in the face of a valid mineral reservation in favor of Santa Fe which severed the surface estate from the mineral estate.

[3] Resolution of this issue will not be the source of controversies; controversies over this land currently exist. As set forth in the Petition, a controversy has existed between Santa Fe and the National Park Service since the late 1970s. Petition at 10 n.14. And this controversy is directly related to the enforceability of the reservation.

A at 29a-30a. Obviously, such an ever-present potentiality impairs the owners' ability to preserve or develop the land and has a severe negative impact on the economic value of the entire 4,000,000 acres.

What remains of respondents' opposition to the first question presented for review is directed to the merits of the issue and presents respondents' sole counter contention that Santa Fe had an unrestricted right to dispose of the grant lands. Full briefing of the question before this Court will, without doubt, demonstrate the blatant deficiencies in respondents' argument.[4] More importantly, respondents' argument serves to highlight the significance of the question presented—whether Santa Fe's scheme to sever and retain the grant lands achieved just the result Congress sought to avoid by an express statutory framework designed to keep the lands with and in aid of the railroad. Such an issue, affecting millions of acres with discovered and yet to be discovered valuable resources, is worthy of this Court's review.

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[4] Indeed, in the very case relied upon by respondents (Br. Opp. at 14), *Platt v. Union Pacific R. Co.*, 99 U.S. 48 (1879), this Court unequivocally recognized the restrictions on disposition of railroad grant lands set forth in the Petition (99 U.S. at 63) and cautioned against dispositions of grant lands "manifestly made to evade . . . the [congressional] purposes for which the grants were made" (99 U.S. at 64), as was Santa Fe's scheme to retain the lands when transferring the railroad to AT&SF.

Moreover, contrary to respondents' argument (Br. Opp. at 11-12), the Spurlocks are not lodging an impermissible collateral attack on Santa Fe's patents. The Spurlocks challenge the mineral reservation on the ground that Santa Fe's title to the grant lands passed to AT&SF in 1903 by operation of law. The patents did not convey title to Santa Fe, which subsequently passed to AT&SF. Rather, title to the grant lands originally vested upon completion of the railroad. *Howard v. Perrin*, 200 U.S. 71, 74-75 (1906); *Toltec Ranch Co. v. Cook*, 191 U.S. 532 (1903). Patents also do not affect title which has already vested in another entity prior to their issuance, as is the case here where title vested in AT&SF. *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 248, 251 (1891).

II. The Decision of the Appellate Court, Conflicting with Decisions of this Court, Must Be Corrected.

Respondents argue that the Spurlocks' second ground for granting a writ of certiorari in this case, *i.e.*, the appellate decision conflicts with decisions of this Court, cannot be considered by this Court because it was not raised below. The second ground, by its very nature, is not subject to respondents' attack. The Spurlocks maintain that the court of appeals' decision finding the term "minerals" unambiguous, relying as it does on *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), is contrary not only to that decision, but to several other decisions of this Court. *See* Petition at 24. A Petition for Review of the court of appeals' decision was timely filed with the Arizona Supreme Court, but review was denied. Thus, it is now appropriate for this Court to review the appellate decision and determine if the result reached there conflicts with the decisions of this Court.

Recognizing the inherent conflict between the decision of the court of appeals in this case and the decisions of this Court, respondents also argue that the decisions of this Court should not apply because they involve congressional legislation granting lands and land rights. But the lands at issue here also were granted pursuant to an act of Congress, the 1866 Act, and were the subject of succeeding legislation in 1897 and 1902. Moreover, as fully set forth in the Petition at 16, a grant of land by Congress is a contract regarding the conveyance of land. In interpreting contracts of that nature, this Court has: (1) found the term "minerals" to be *per se* ambiguous, and (2) examined the intent of Congress as party to and maker of the contract. In this regard, there is no difference between the conveyance of land by Congress at issue in *Watt* and the conveyance by Santa Fe of the land granted by Congress—matters outside the contract, including the intent of the parties, must be examined to resolve the inherent ambiguity in the term "minerals." The

court of appeals' decision, refusing to permit this mandated examination, is thus fundamentally unsound and must be corrected.

III. The Presiding Judge's Failure to Recuse Himself Should Be Considered by this Court.

Respondents argue that review of the recusal question is inappropriate because the Spurlocks did not demand the presiding judge's recusal. In particular, respondents assert that certain statements in letters to Judge Haire from counsel for the Spurlocks demonstrate that a recusal request was not made. Counsel's letters, however, unambigously state that a recusal question existed because of material knowledge possessed by Judge Haire [5] and that it was the court's duty to consider that question. Moreover, Canon 3C of the Arizona Code of Judicial Conduct relieves the party of the need to demand recusal and places a positive duty on the court to undertake determination of the question whenever the circumstances, regardless of how they are brought to the attention of the court, raise the question.

Contrary to respondents' argument, the positive mandate that recusal occur where a judge's impartiality might reasonably be questioned because he has personal knowledge of disputed evidentiary facts cannot be waived and permitting objections of untimeliness or failure to raise the issue, as respondents attempt here, would defeat the purpose of the Canon. *See Wm. Cramp & Sons v. International Curtis Marine Turbine Co.*, 228 U.S. 645, 650 (1913). *See also, SCA Services v. Morgan*, 557 F.2d 110 (7th Cir. 1977); *Spires v. Hearst Corp.*, 420 F.Supp. 304 (C.D. Cal. 1976). Thus, the overriding consideration of preventing even the appearance of impartiality on

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[5] Contrary to respondents' assertion of "minimal evidentiary value" (Br. Opp. at 22), as demonstrated in the Petition at 27-28, the facts possessed by Judge Haire were material to one of the core issues in the case, *i.e.*, the meaning of the mineral reservation.

the part of a judge must prevail and dictates review of the question of violation of the Spurlocks' fundamental right to due process by Judge Haire's failure to recuse himself.

CONCLUSION

For the reasons set forth in the Petition and herein, a writ of certiorari should be granted to review the decision of the Court of Appeals of the State of Arizona.

Respectfully submitted,

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